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Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES
October 1995 Term

ROBERT A. CLARKE,

Petitioner,

v.

MORETON B. HALL, D. HUGH ADAMSON, and FENNOSCANDIA BANK LIMITED,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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106 pp

QUESTIONS PRESENTED FOR REVIEW

Primary Issue: Whether, under the "saving clause" of Federal Rule of Civil Procedure 60(b) ("Rule 60(b)"), an independent equitable action may be maintained for relief from a prior federal judgment on the basis of newly discovered evidence of perjury by a principal, material witness.

Subsidiary Issues:

(1) Whether, as some Courts of Appeals have held, a party may maintain an independent equitable action to open a judgment based upon the alleged fraud of an adverse party.

(2) Alternatively, whether, as other Courts of Appeals have held, the only basis for opening a judgment after the one-year time limitation imposed by Rule 60(b)(1 through 3) has expired, is a demonstration of "fraud on the court."

(3) Whether the doctrine announced by this Court in United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93 (1878) -- that an equitable action to open a judgment may be maintained only where the fraud was extrinsic or collateral to the matter tried in the first court -- retains validity in light of subsequent precedent (e.g., Marshall v. Holmes, 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870 (1891)) and critical commentary.

(4) Pursuant to Supreme Court Rule 14.1(a), all other subsidiary questions fairly included within any of the above issues.

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STATEMENT OF THE BASIS FOR JURISDICTION

Date of the Order sought to be reviewed:	October 24, 1995
Date of any order respecting rehearing or granting an extension of time:	Not Applicable
Reliance on Rule 12.5:	Not Applicable
Statutory provision believed to confer jurisdiction on this Court:	28 U.S.C. § 1254
Rule 29.4 Notifications:	Not Applicable

RULES INVOLVED IN THE CASE

Rule 60(b) of the Federal Rules of Civil Procedure, which provides in full:

Rule 60. Relief From Judgment or Order

* * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are

abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

I. INTRODUCTION.

Plaintiff/Petitioner Robert A. Clarke ("Clarke") petitions for a Writ of Certiorari for review of a Rule 12(b)(6) dismissal of his independent equitable action in fraud for relief from a prior federal judgment. The basis for the fraud action is newly discovered evidence that the prior judgment was obtained through the perjured testimony of two material witnesses, one of whom is an attorney. The newly discovered evidence -- which the District Court had to accept as true for purposes of the motion to dismiss -- consists of an *admission* by one of the two witnesses that his previous testimony was false. In addition, two persons of whom Clarke was previously unaware have now come forward with statements that directly contradict the testimony of the trial witnesses.

The District Court of Delaware dismissed Clarke's fraud action and the Third Circuit affirmed in a two-page memorandum opinion. Although the Third Circuit did not elaborate on its rationale for affirmance, the Delaware court's decision makes clear its view that Clarke was required to prove "fraud on the court" in order to prevail and that perjured testimony, even if true, is insufficient for this purpose. As discussed in Clarke's Argument, below, the Delaware court reached its decision based upon a line of cases by certain Courts of Appeals which: (1) conflict with similar decisions by other Circuits; (2) conflict with the letter and the spirit of Rule 60(b)'s "saving clause" permitting independent actions to be maintained based upon fraud by an adverse party; and (3) are based in part upon Supreme Court precedent inconsistent with later decisions of this Court.

This "Statement of the Case" will set forth, in order, the facts surrounding the underlying controversy among the parties; the Delaware court's decision in the original Delaware action (the "Original Action"), with particular emphasis on the importance the Delaware court placed on the perjured testimony; the newly discovered evidence that the prior testimony was in fact false; and, finally, a description of this equitable fraud action (the "Fraud Action") and the Delaware court's disposition of it.

II. THE UNDERLYING CONTROVERSY.

The underlying facts in this controversy involve alleged federal securities laws violations arising from the foreclosure by Defendant/Respondent FennoScandia Bank Limited ("FennoScandia") on a loan by FennoScandia to Alexandra Mining Company (Bermuda) Limited ("Alexandra Mining"), a company of which Clarke was the president and principal shareholder. The collateral for the $5,000,000 (Canadian) loan was 4,897,085 shares of the common stock of DRX, Inc. ("DRX") owned by Alexandra Mining.* DRX was a Delaware corporation engaged in the business of exploring for gold and other precious metals. At relevant times, Clarke was also President, Chairman of the Board and Chief Executive Officer of DRX. (A3-A6)

Clarke and Peter Webster ("Webster"), who was at the time a member of Alexandra Mining's Board of Directors, negotiated the loan on Alexandra Mining's behalf in June 1987. (A6) FennoScandia extended the

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* The original collateral for the loan was 800,000 units of McFinley Red Lake Mines, which DRX purchased from Alexandra Mining pursuant to a stock swap.

loan several times. (A6) In the Original Action, Clarke claimed that at a March 17, 1989 meeting FennoScandia's Executive Director, Defendant/Respondent David Hugh Adamson ("Adamson"), verbally agreed to an extension of the loan, a contention which Adamson denied. (A13) Ultimately, the Delaware court found against Clarke on this issue, the resolution of which depended entirely upon the court's assessment of the respective credibility between the conflicting testimonies of Clarke and Adamson. (A13)

In any event, a April 28, 1989 letter from FennoScandia notified Clarke that it would not renew the Alexandra Mining loan (the "April 28 non-renewal letter"). During the previous week -- April 20 through April 28 -- FennoScandia officials, including Adamson and in-house counsel Moreton G. Hall ("Hall"), had met in London with Webster (who by this time had been fired by Clarke from his position as an Alexandra Mining director), and Allan Brown ("Brown"), a New Zealand mining engineer and consultant. The meetings were held at the behest of Warren Hinks ("Hinks"), who was at the time an officer of DRX's Westland subsidiary and, prior to its merger with DRX, had been President and co-founder of Westland Minerals Exploration Company. Hinks' goal in arranging the meetings was to oust Clarke as DRX's President and CEO. (A5 n. 6, A13-A15, A21)

In the Original Action Clarke contended that at the London meetings, FennoScandia, in breach of its duties, had disclosed to Webster and Brown confidential loan documentation pertaining to the Alexandra Mining loan, including the April 28 non-renewal letter. As discussed below, this contention, which the Delaware court ultimately rejected based upon its assessment of the credibility of the meetings' participants, was the cor-

ner-stone of Clarke's allegations that the defendants violated the federal securities laws.

On December 5, 1989, the DRX Board of Directors voted to remove Clarke from his positions as President, CEO and Chairman of the Board. Clarke remained a director until the March 27, 1990 DRX shareholders' meeting at which the management-sponsored slate of proposed directors defeated a slate proposed by Clarke. (A7).

III. THE ORIGINAL DELAWARE ACTION.

In April 1990, Clarke filed the Original Action against DRX, FennoScandia, and certain DRX directors and former employees. Clarke v. DRX, Inc., et al., C.A. No. 90-161 (D. Del.). One of Clarke's principal claims in the Original Action was that the proxy statement issued in connection with the March 27, 1990 DRX shareholders violated § 14(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78n(a) (1988), by failing to disclose a conspiracy among FennoScandia, Hinks, Brown, Webster and others to oust Clarke as President of DRX. (A8).* That alleged conspiracy, in turn, depended in large part on Clarke's contention that FennoScandia, through Adamson, had reneged on its earlier agreement to extend the Alexandra Mining loan as a result of agreements reached at the London meetings with Brown and Webster to oust Clarke from DRX. And the primary evidence that FennoScandia in fact reached

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* In addition, Clarke alleged violations of Section 13(d) of the Exchange Act, 15 U.S.C. § 78m(d) (1988), as well as certain violations of state law. (A8)

such an agreement was Clarke's contention that FennoScandia had disclosed confidential Alexandra Mining loan documentation at the meetings. (A13-A15)

The court placed the case on an expedited trial schedule because of concerns regarding DRX's financial stability. (A7) Hall was deposed just one day prior to trial. At trial, the testimony regarding what occurred at the London meetings was, in the court's words, "in direct conflict." (A14) Webster testified that FennoScandia officials (specifically, FennoScandia's in-house attorney, Hall) in fact allowed Webster and Brown access to the Alexandra loan documentation. Hall, on the other hand, testified that the documentation file and the April 28 non-renewal letter were not shown to Webster and stated that the letter had not been drafted until after Webster and Brown had left FennoScandia's offices on April 28. Obviously, one of the witnesses was telling the truth, while the other one was perjuring himself. (A14-A15)

The Delaware court resolved this conflict in testimony against Webster and in favor of Hall. Specifically, the court found that:

> during the London meetings FennoScandia officials did not allow Webster or Brown to see any of the confidential loan documentation pertaining to the Alexandra Mining loan, including the April 28, 1989 letter in which FennoScandia informed Clarke that they would not renew the Alexandra Mining loan.

(A14). In reaching this finding, the court was "primarily influenced by the Court finding that Webster is not a

credible witness...." (A14) By contrast, the court found "Hall to have been a highly credible witness." (A14)

As a direct result of these findings, the Delaware court concluded that no conspiracy between FennoScandia and DRX officers to oust Clarke from his positions at DRX existed, and therefore "there was no material omission or misstatement in the proxy statement because there was no conspiracy." (A24)*

IV. NEWLY DISCOVERED EVIDENCE OF PERJURY BY THE DEFENDANTS.

Thus Clarke's lack of success in the Original Action was caused by Hall's testimony, contradicted by Webster, that Alexandra Mining loan documentation was not shown to Webster and Brown at the London meetings. Since the expedited trial in the Original Action, three pieces of newly discovered evidence demonstrate that Hall, an attorney, committed perjury at trial.

One of the most significant pieces of evidence is the admission of Adamson, FennoScandia's Executive Officer, that Webster's (and not Hall's) version of the crucial events was accurate. Specifically, during a meeting between Adamson and Clarke after trial, when Clarke confronted Adamson with the fact that Hall had showed Webster and Brown the April 28 non-renewal letter, Adamson replied: "*yes*, but *I* didn't show [Webster and Brown] the letter." (A61-A62) This statement by Adamson, a FennoScania officer who attended the

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* The Third Circuit affirmed after Clarke's pro se appeal of the judgment in the Original Action. This Court denied certiorari on Clarke's pro se petition.

London meetings, clearly constitutes a tacit admission that the letter was in fact shown and that Hall showed it.

In addition, two new witnesses have come forward with statements corroborating Webster's version of the events. The first such witness is John Cook, a Chartered Accountant living in Warwick, England. Mr. Cook's statement confirms that:

> On Friday the 28th April 1989, I met with Mr. Peter Webster, as a friend and ex-colleague at United Guarantee, at the Goring Hotel in London. He related to me that at a meeting at Fennoscandia's offices earlier that day, he was shown by Hugh Adamson, who I know, and Mr. Moreton Hall (whom I have heard of but do not recall ever meeting), a letter confirming that Fennoscandia's loan to Alexandra Mining was not being renewed. Peter was aware of the implications of this and surprised that he had been told so openly.

(A67). This substantially contemporaneous statement by Webster to Mr. Cook is fully consistent with Webster's trial testimony and is thus extremely strong evidence that Webster was being truthful at trial.

The second witness is William J. Cummer, a retired officer of Westburne International Industries Limited. Mr. Cummer, referring to a meeting he had with Webster in May 1989, states that:

> Peter Webster told me that he felt that he should inform me that my investment in AMC was at risk. He said that during his

> visit to London he had met with AMC's London Bank, FennoScandia, and had found out that FennoScandia intended not to renew AMC's loan when this fell due. Mr. Webster also referred to AMC's shares in DRX Inc. which were charged to the bank as security for the loans. He inferred that the bank would ultimately foreclose on those shares.

(A71). Thus Mr. Cummer's statement further confirms Webster's account of the events that took place at the London meetings.

The significance of the Cook and Cummer statements is great. The Delaware court had rejected Webster's trial testimony for the primary reason that:

> Webster was hostile to Clarke (because Clarke had terminated him from Alexandra Mining), until Clarke gave Webster, who was at that time in a poor financial situation, a financial stake in the outcome of this litigation and paid him a substantial sum for his testimony....

(A14) The fact that Webster made statements consistent with his trial testimony to at least two other persons *prior* to his reconciliation with Clarke thus removes the principal reason the Delaware court rejected Webster's testimony.

In short, three pieces of newly discovered evidence show that the judgment against Clarke and in favor of the defendants in the Original Action was obtained through perjured testimony by an attorney. The

Delaware court was required to accept this evidence as true for purposes of defendants' motion to dismiss the Fraud Action.

V. THE FRAUD ACTION.

On March 3, 1994, Clarke brought an independent action against Hall, Adamson and FennoScandia for relief from the judgment in the Original Action. Clarke v. Hall, et al., C.A. No. 94-185 (D. Del.).* Jurisdiction in the Delaware court was conferred by 28 U.S.C. § 1331. (A56)

The action was brought under the so-called "saving clause" of Rule 60(b), which provides in part that "[t]his rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment...." In the Fraud Action, Clarke alleged "pursuant to Rule 60(b)(3), that the judgment in [the Original Action] was obtained by fraud and as such, should be set aside." (A39)

All defendants moved to dismiss the Fraud Action, pursuant to Rule 12(b)(6), for failure to state a claim upon which relief can be granted. (A39) In support of their motion, the defendants argued "that Plaintiff fails to state a claim pursuant to Rule 60(b) because he does not allege any evidence to establish the occurrence of fraud on the court." (A39)

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* Clarke initially brought the Fraud Action in the Southern District of New York. Clarke v. Hall, et al., C.A. No. 94 Civ. 1598 (S.D.N.Y.). (A51) The New York court subsequently transferred the action to the District of Delaware. (A36)

The Delaware court accepted the defendants' arguments and dismissed Clarke's Amended Complaint. In its decision, the court apparently held that in order to prevail, Clarke must allege facts which, if true, would constitute "fraud on the court." (A41-A42). The court also apparently held that, in order to prevail, the alleged fraud must have prevented Clarke from fully and fairly presenting his case. (A40)

In addition, relying on a decision by the Court of Appeals for the Second Circuit, the court stated that "after discovered evidence of alleged perjury by a witness is simply not sufficient for a finding of 'fraud on the court.'" (A42), quoting Gleason v. Jandrucko, 860 F.2d 556, 559 (2d Cir. 1988). Finally, the court held:

> that its previous determination of the credibility of defense witnesses is applicable to this Motion, and that Plaintiff presents no evidence, which as a matter of law, rises to the level of fraud on the court.

(A42). The Third Circuit affirmed in a two-page memorandum opinion. (A47).

By this Petition, Clarke argues that the Delaware court, in reliance on a line of decisions by certain Courts of Appeals, erroneously required him to allege facts constituting fraud on the court. Clarke contends, consistent with decisions from this Court as well as other Courts of Appeals, that fraud perpetrated by the adverse party in the form of perjured testimony, if proven, is sufficient to require relief from judgment. Finally, Clarke contends that in requiring him to allege fraudulent conduct that, if true, would have prevented him from fully and fairly presenting his case, the Delaware court was

requiring him to meet a standard imposed by 19th century Supreme Court authority inconsistent with later decisions by this Court.

In light of the number of Rule 60(b) motions and independent actions seeking relief from judgment, the standard on which to evaluate such requests for relief constitutes an important matter for which uniformity among the Courts of Appeals is essential. Clarke respectfully requests that the Court grant his Petition to clarify the law and resolve the conflict among the Circuits.

ARGUMENT

I. SUMMARY OF THE ARGUMENT.

Clarke relies upon two grounds in support of this Petition for Certiorari. First, the Delaware court held that Clarke was required to prove "fraud on the court" in order to prevail in his independent action under the "saving clause" of Rule 60(b), a standard which is significantly more difficult to meet under prevailing law than simple fraud by an adverse party. Although decisions by some Courts of Appeals support the Delaware court's interpretation of the "saving clause," the decisions of other Courts of Appeals holding that fraud by an adverse party is sufficient for relief from a prior judgment are consistent with both Rule 60(b) and this Court's precedent. We address this argument in Part II, below.

Second, the Delaware court held that alleged fraudulent misconduct must have prevented Clarke from fully and fairly presenting his case. (A40) This requirement derives from the distinction made by this Court in United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93 (1878) between extrinsic fraud (i.e., fraud that prevented the party from fully presenting his case), for which equity will grant relief, and intrinsic fraud, for which equity will not (the "*Throckmorton* doctrine"). The distinction between extrinsic and intrinsic fraud did not survive this Court's decision in Marshall v. Holmes, 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870 (1891) and is inconsistent with the express terms of Rule 60(b). This argument is addressed in Part III, below.

II. AN INDEPENDENT ACTION FOR RELIEF FROM A JUDGMENT NEED NOT ALLEGE "FRAUD ON THE COURT."

A. Rule 60(b) and the "Saving Clause."

As amended in 1946, Rule 60(b) sets forth two separate procedures to obtain relief from judgments. The first procedure is by motion and encompasses subsections (1) through (6), which set forth the grounds for which motions for relief from judgment may be made. For example, Rule 60(b)(2) authorizes relief from a judgment for "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 60(b)(3) authorizes relief from judgment for "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." The motion procedure was unavailable to Clarke because he did not discover his grounds for relief until after the one-year time limitation applicable to Rule 60(b)(1 to 3) had expired.

The second procedure to obtain relief from judgment, and the one Clarke employed here, is to file an independent action. Rule 60(b) expressly preserves a party's right to file an independent action in what is generally termed the "saving clause:"

> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, *or* to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, *or* to set aside a judgment for fraud upon the court.

Fed.R.Civ.P. 60(b) (emphasis added). Thus, the saving clause preserves the court's power to grant relief from judgment in three separate and distinct ways: (1) the court may entertain an independent action for relief; (2) the court may grant relief to a defendant not notified as provided in 28 U.S.C. § 1655; and (3) the court may set aside a judgment for fraud upon the court. See 7 J. Moore, Moore's Federal Practice, ¶¶ 60.31, 60.32 and 60.33 at pp. 60-348 to 60-351 (2d ed. 1995).

B. The Conflict Among the Circuits.

Notwithstanding the fact that the saving clause authorizes a court to grant relief in an independent action *or* for fraud on the court, the Delaware court in this case as well as a number of decisions by the Courts of Appeals hold that "fraud on the court" is the only ground upon which to obtain relief from judgment after Rule 60(b)'s one-year time limitation has expired.*

For example, in Gleason v. Jandrucko, 860 F.2d 556 (2d Cir. 1988), the case on which the Delaware court principally relied in dismissing Clarke's Amended Complaint, the court held that:

> Although both clause (3) and the saving provision of Rule 60(b) provide for relief from a judgment on the basis of fraud, the

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* This Court has long acknowledged the inherent power of a court to remedy fraud perpetrated on it. Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). Clarke contends that his evidence of perjury by two witnesses, one of whom is an attorney, constitutes sufficient allegations of fraud on the court to survive a motion to dismiss.

> type of fraud necessary to sustain an independent action attacking the finality of a judgment is narrower in scope than that which is sufficient for relief by timely motion. Indeed, "fraud upon the court" as distinguished from fraud on an adverse party is limited to fraud which seriously affects the integrity of the normal process of adjudication.

Gleason, 860 F.2d at 558-559 (citations omitted). See also Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1325 (2d Cir. 1995) (same). Similarly, in Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984 (4th Cir. 1987), another case on which the Delaware court relied, the Fourth Circuit required a plaintiff bringing an independent action to set aside a judgment on the basis of perjured testimony to prove fraud on the court. Id. at 986-987.

To the same effect is the Ninth Circuit's decision in In re Intermagnetics America, Inc., 926 F.2d 912 (9th Cir. 1991), a case involving a claim by a Trustee in Bankruptcy to set aside a prior Bankruptcy court order authorizing a sale of the debtor company on the grounds that the order was obtained by fraud. In that case, the court's analysis focuses solely upon whether the Bankruptcy court order was obtained through fraud on the court. Id. at 916-917. But see In re: Hunter, 66 F.3d 1002, 1005 (9th Cir. 1995) (recognizing that an independent action for fraud may succeed upon an allegation of fraud against an adverse party, as opposed to fraud on the court). The Federal Circuit appears to have adopted this same rule of law. Broyhill Furniture Industries, Inc. v. Craftmaster Furniture Corp., 12 F.3d 1080 (Fed. Cir. 1993).

Other Courts of Appeals, however, have recognized that:

> Neither the text of Rule 60(b) nor its legislative history permits a construction which would limit an independent action for relief from a judgment to "fraud on the court" as distinguished from fraud of some other sort.

Averbach v. Rival Manufacturing Co., 809 F.2d 1016, 1021 (3d Cir.), cert. denied, 482 U.S. 915, 107 S.Ct. 3187, 96 L.Ed. 2d 675 (1987), cert. denied, 484 U.S. 822, 108 S.Ct. 83, 98 L.Ed. 2d 45 (1987). The Tenth and Eleventh Circuits also recognize the right to bring an independent equitable action on the grounds of fraud other than fraud on the court. Robinson v. Volkswagenwerk AG, 56 F.3d 1268, 1274 (10th Cir. 1995); S.E.C. v. ESM Group, Inc., 835 F.2d 270, 272-273 (11th Cir.), cert. denied sub nom. Peat Marwick Main & Co. v. Tew, 485 U.S. 1055, 108 S.Ct. 2822, 100 L.Ed. 2d 923 (1988); The Travelers Indemnity Co. v. Gore, 761 F.2d 1549, 1551 (11th Cir. 1985). The First Circuit recently recognized that "'fraud on the court' is ... not the only permissible basis for an independent action," yet the court's opinion leaves little, if any, room for such an action to succeed absent proof of fraud on the court. Geo. P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d 44, 48 (1995).

Under Rule 60(b)(3), a party subject to a judgment obtained by the adverse party's perjured testimony has the undoubted right to relief. Harre v. A.H. Robins Co., 750 F.2d 1501, 1504-1505 (11th Cir. 1985) (granting a Rule 60(b)(3) motion on the ground that a principal expert witness had perjured himself at trial); Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 833

(7th Cir. 1985) (under Rule 60(b)(3), "an adverse party's fraud or subornation of perjury permits relatively free reopening of the judgment when the perjury goes to the heart of the issue"); Peacock Records, Inc. v. Checker Records, Inc., 365 F.2d 145, 147 (7th Cir. 1966) (granting a Rule 60(b) motion where the judgment was obtained in part through perjury), cert. denied 385 U.S. 1003, 87 S.Ct. 707, 17 L.Ed. 2d 542 (1967). See Fed.R.Civ.P. 60(b)(3) (authorizing relief from judgment for fraud "whether heretofore denominated as intrinsic or extrinsic"); 7 J. Moore, Moore's Federal Practice, ¶ 60.37[1] at p. 60-376 (2d ed. 1995) (intrinsic fraud includes perjury). But some Courts of Appeals refuse to apply the same standards to independent actions in the belief that to permit an independent action to proceed absent fraud on the court "could easily overwhelm the specific [fraud] provision of 60(b)(3) and its [one-year] time limitation." Broyhill Furniture, 12 F.3d at 1085. See Geo. P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d at 47, 49. However, to recognize the right to the same relief by an independent action will not allow a litigant simply to disregard Rule 60(b)'s one-year time limitation with impunity; a plaintiff bringing an independent action, unlike a Rule 60(b) movant, is subject to traditional equitable principles such as laches, as well as any applicable statute of limitations. 7 J. Moore, Moore's Federal Practice, ¶ 60.37[1] at p. 60-383 to 384 (2d ed. 1995); Averbach, 809 F.2d at 1020, quoting Fed.R.Civ.P. 60(b) advisory committee note.

In light of the diverse holdings by the Courts of Appeals, the First Circuit's recent statement that there is "a modicum of disagreement in the circuits" on this issue is an understatement. Geo. P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d at 47. Clarke respectfully requests that the Court grant his Petition for a Writ of Certiorari to resolve this conflict by definitively holding that he has

the right to bring an independent action for relief from the judgment obtained by the perjured testimony of the defendants.

III. THE *THROCKMORTON* DOCTRINE SHOULD BE EXPRESSLY OVERRULED.

A. *Throckmorton* and its Distinction Between Intrinsic and Extrinsic Fraud.

In 1878, this Court decided the case of United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93 (1878). Throckmorton involved a twenty-year old district court judgment which had upheld a claim by one Richardson under a Mexican land grant. In seeking to set aside the claim on the grounds of fraud, the United States alleged that Richardson had caused a former official to sign a fraudulently antedated land grant so as to lead the court to believe that the land grant had been made at a time when the official had the power to make such grants. The United States also alleged that Richardson filed false documents and depositions of perjured witnesses. Id. at 62-62, 25 L.Ed. at 94.

In affirming the lower court's dismissal of the United States' claim, this Court held that if fraud is the basis for relief from a judgment, then the fraud must be extrinsic and not intrinsic. Specifically, the Court announced the following doctrine:

> [T]he acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic

> or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.

Id. at 68, 25 L.Ed. at 96. Extrinsic fraud, the Court explained, occurs:

> [W]here the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent.

Id. at 65, 25 L.Ed. at 95. However, according to the Throckmorton Court, equity will not grant relief for intrinsic fraud:

> [T]he doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed.

Id. at 66, 25 L.Ed. at 95.

This dichotomy between extrinsic fraud, for which equity will grant relief, and intrinsic fraud, for which it will not, has become known as the *Throckmorton* doctrine. See, e.g., 7 J. Moore, Moore's Federal Practice, ¶ 60.37[1] at 60-373 (2d ed. 1995). The distinction between extrinsic and intrinsic fraud has been criticized by the commentators:

> The distinction rests on clouded and confused authorities, its soundness as a

> matter of policy is very doubtful, and it is extremely difficult to apply.

11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2868 at 400-401 (2d ed. 1995). See also 7 J. Moore, Moore's Federal Practice, ¶ 60.37[1] at 60-377 to 60-380 (2d ed. 1995).

B. The Conflict Among the Circuits.

As a number of courts (discussed below) have recognized, the *Throckmorton* doctrine probably did not survive the Court's decision, decided thirteen years later, in Marshall v. Holmes, 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870 (1891). The Marshall case involved an action to enjoin certain judgments allegedly obtained through false testimony and forged documents. Id. at 590, 12 S.Ct. at 62, 35 L.Ed. at 871. The first Justice Harlan held that equity could grant relief, reasoning that:

> While the court, upon final hearing, would not permit Mrs. Marshall -- being a party to the actions at law -- to plead ignorance of the evidence introduced at the trial, it might be that relief could be granted by reason of the fact, distinctly alleged, that some of the necessary proof establishing the forgery of the letter was discovered after the judgments at law were rendered, and after the legal delays within which new trials could have been obtained, and could not have been discovered by her sooner.

Id. at 600-601, 12 S.Ct. at 66, 35 L.Ed. at 874. The perjured testimony and forged documents at issue in Marshall obviously constituted intrinsic fraud. Thus the

intrinsic/extrinsic fraud distinction established by the Court in Throckmorton cannot be reconciled with this Court's later ruling in Marshall. A number of the Courts of Appeals have so held. See In re Hunter, 66 F.3d at 1005 ("we would be surprised if our case law retains a distinction between 'intrinsic fraud' and 'extrinsic fraud'); Averbach, 809 F.2d at 1022 ("the extrinsic-intrinsic fraud distinction was rejected by this court").

Other Courts of Appeals, on the other hand, have expressly retained the *Throckmorton* doctrine. See Traveler's Indemnity Co., 761 F.2d at 1552 ("[u]nder the *Throckmorton* doctrine, for fraud to lay a foundation for an independent action, it must be such that it was not in issue in the former action nor could it have been put in issue by the reasonable diligence of the opposing party."); Geo. P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d at 47 (discussing "[t]he Throckmorton rule"); Robinson, 56 F.3d at 1265 (citing Throckmorton with approval).

And yet another Court of Appeal, while verbally recognizing that Throckmorton is no longer good law, nonetheless requires plaintiffs under Rule 60(b)'s saving clause to meet Throckmorton's requirements:

> Although we agree with plaintiff that relief from judgment by way of an independent action need not be premised on a showing of extrinsic as opposed to intrinsic fraud, an aggrieved party seeking relief under the saving clause of Rule 60(b) still must be able to show that there was no "opportunity to have the ground now relied upon to set aside the judgment fully litigated in the original action."

Gleason, 860 F.2d at 560, quoting Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 n.2 (2d Cir.), cert. denied, 409 U.S. 883, 93 S.Ct. 173, 34 L.Ed. 2d 139 (1972) (citations omitted).

Rule 60(b)(3) permits relief from judgment on the grounds of fraud "whether heretofore denominated intrinsic or extrinsic)," and thus expressly repudiates the *Throckmorton* doctrine where relief is made by motion. Nevertheless, as Professor Moore has noted, as far as independent actions for relief are concerned:

> despite doubts expressed against *Throckmorton* and in favor of *Marshall*, the federal cases generally adhere, at least in statement, to the *Throckmorton* dichotomy of extrinsic and intrinsic fraud.

7 J. Moore, Moore's Federal Practice, ¶ 60.37[1] at 60-379 to 60-380 (2d ed. 1995).

That is precisely what the Delaware court did in this case. Although the Third Circuit has rejected Throckmorton (e.g., Averbach, 809 F.2d at 1022), the Delaware court nonetheless required Clarke to prove that the perjury "prevented [him] from fully and fairly presenting [the] case." (A40), quoting Stridiron v. Stridiron 698 F.2d 204, 207 (3d Cir. 1983). That rule of law, of course, is nothing more than a restatement of Throckmorton's definition of extrinsic fraud -- "where the unsuccessful party has been prevented from exhibiting fully his case." Throckmorton, 98 U.S. at 65, 25 L.Ed. at 95. Despite Clarke's newly discovered evidence of perjury by Hall and Adamson and despite the fact that Hall's and Adamson's testimonies were critical to the court's previous judgment, the Delaware court refused as a matter of law,

in accordance with the *Throckmorton* doctrine, "to entertain an independent action to challenge the credibility of a witness where the credibility of that witness was addressed in the original proceeding." (A42)

Thus, the Delaware court dismissed Clarke's Amended Complaint on the basis of a remnant from Throckmorton, a case impliedly overruled by Marshall, rejected by a number of Courts of Appeals, and criticized by the commentators. Clarke requests that the Court grant this Petition expressly to overrule Throckmorton and its outmoded, criticized doctrine.

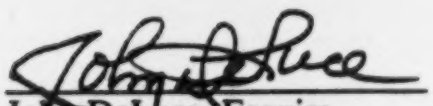
IV. CONCLUSION.

The Delaware court's understandable desire for finality should not be permitted to override the injustice of a fraudulently obtained judgment. By dismissing Clarke's Fraud Action on a Rule 12(b)(6) motion, the court assumed that Hall and Adamson had in fact perjured themselves in the Original Action. The court thus held *as a matter of law* that a judgment obtained through perjured testimony of material witnesses on a critical issue cannot be challenged. More importantly for purposes of this Petition, the court did so on the basis of erroneous legal principles.

As this Court recently reiterated, equity has "inherent and discretionary power ... to set aside a judgment whose enforcement would work inequity." Plaut v. Spendthrift Farm, Inc., 514 U.S. ___, 115 S.Ct. 1447, 1460, 131 L.Ed. 2d 328, 352 (1995). We submit that enforcement of a judgment obtained by perjury is inequitable and that such a judgment cannot stand.

For the foregoing reasons, Clarke respectfully requests that this Court grant his Petition and hear his appeal on the merits.

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT A. CLARKE, Plaintiff,	:	
V.	:	Civil Action No. 90-161-JJF
DRX, INC., HOWARD BUTCHER IV, GEORGE G. BLAKEY, RUDI P. FRONK, GEORGE J. HARTNETT, WARREN M. HINKS, JR., JAMES MARTIN PAUL R. SUTTON, JAMES MESSEGEE, HENRY COLEN and FENNOSCANDIA BANK LIMITED, Defendants,	:	

ORDER

At Wilmington this \1st\ day of February, 1991, for the reasons set forth in the Memorandum Opinion issued this date,

IT IS HEREBY ORDERED that Judgment is entered for the Defendants.

\Joseph J. Farnan\
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT A. CLARKE, Plaintiff,	:	
V.	:	Civil Action No. 90-161-JJF
DRX, INC., HOWARD BUTCHER IV, GEORGE G. BLAKEY, RUDI P. FRONK, GEORGE J. HARTNETT, WARREN M. HINKS, JR., JAMES MARTIN PAUL R. SUTTON, JAMES MESSEGEE, HENRY COLEN and FENNOSCANDIA BANK LIMITED, Defendants,	:	

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Warren H. Hinks, Jr., Pro Se Defendant.

MEMORANDUM OPINION

February 1, 1991
Wilmington, Delaware

\Joseph J. Farnan\
FARNAN, District Judge.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Robert A. Clarke ("Clarke"), a beneficial owner of DRX, Inc. ("DRX") common stock, was a director of DRX from 1987 until March 27, 1990, and served as Chairman of the Board, Chief Executive Officer and President from November 1987 until December 5, 1989. DRX is a Delaware corporation with its principal place of business in Denver, Colorado. Through its subsidiaries, it engages in the business of exploring for gold and other precious metals. Defen-

dants Howard Butcher IV ("Butcher"),[1] George G. Blakey ("Blakey"), Rudi P. Fronk ("Fronk"),[2] George J. Hartnett ("Hartnett"),[3] and James R. Martin ("Martin")[4] were elected as Directors of DRX at a March 27, 1990 meeting of stockholders. Defendants Henry Colen ("Colen")[5], Warren H. Hinks, Jr. ("HINKS")[6] and James Messegee ("Messegee")[7] former employees of DRX.

On November 17, 1987 Clarke became President, Chairman of the Board and the Chief Operating Officer

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1 Butcher has been Chairman of the Board and Chief Executive officer of DRX since December 1989, and was Vice-Chairman from November 1987 until December 1989.

2 Fronk has been President of DRX since February 1990 and Chief Financial officer since August 1989.

3 Hartnett has been Secretary of DRX since December 1989.

4 Martin has been executive Vice-President of DRX since February 1990, and Chief Operating Officer since August 1989.

5 Colen founded Micronesian Mineral Resource Company Limited (Micromin") in 1986, which merged with DRX in March, 1989. After the merger, Colen became President of the DRX Micromin subsidiary, and was fired from this position by Clarke one month later, in April of 1989. Colon received 200,00 shares of DRX in the merger, which shares he sold in the fall of 1990.

6 Hinks was President and co-founder of Westland Minerals Exploration Company ("Westland"), and became an officer of DRX's Westland subsidiary after it merged with DRX in 1988. Hinks served as acting President of DRX from December 1989 until February 1990, and is currently President Emeritus of DRX, as well as a shareholder.

7 Messegee is a former Vice-President of Westland, who became an employee of DRX on May 13, 1988 when Westland merged with DRX. Messegee was fired by Clarke on June 5, 1989.

("CEO") of DRX, Inc. In December 1987, DRX entered into a stock swap with Alexandra Mining Company (Bermuda) Limited ("Alexandra Mining") , a company of which Clarke is the President and principal shareholder. Under the terms of the stock swap agreement, DRX purchased from Alexandra Mining 800,000 units of McFinley Red Lake Mines for 4,897,085 shares of DRX's common stock.

In June of 1987 Clarke and Peter Webster ("Webster")[8] negotiated a $5,000,000 (Canadian) loan on behalf of Alexandra Mining from defendant FennoScandia Bank Limited ("FennoScandia"),[9] which loan was to enable Alexandra Mining to acquire a stake in McFinley Red Lake Mines ("McFinley Mines"). As security, FennoScandia received a pledge of 4,897,085 shares of DRX stock,[10] a guarantee from Inverlussa Trust (a trust of which Clarke is the settlor), and a limited personal guarantee from Clarke to FennoScandia.

FennoScandia extended the loan several times. However, in a letter dated April 28, 1989 ("the non-

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8 Webster was a director of Alexandra Mining from April, 1987 until December, 1988.

9 Defendant Paul R. Sutton ("Sutton") is an Executive Director, Credit Controller and Compliance officer of defendant FennoScandia Bank Limited.

10 The initial security for the Alexandra Mining loan was for all of the shares and warrants obtained from McFinley Mines. However on January 7, 1988, after McFinley Mines was subsequently merged into DRX, Fennoscandia agreed to a substitution of the initial 800,000 shares and 800,00 warrants in McFinley Mines for 4,897,085 shares of DRX, Inc.

renewal letter"), FennoScandia notified Clarke that it would not be extending the Alexandra Mining loan past the June 30, 1989 due date. Therefore, when Clarke eventually defaulted on the loan, the Alexandra Mining shares pledged as collateral were eventually transferred and registered in the name of FennoScandia Bank.

Clarke's claims stem from his allegations concerning the non-renewal of the Alexandra mining loan by FennoScandia, and from actions that allegedly took place April 20 through 28, 1989 at meetings in London between Webster, Allan Brown ("Brown"), a New Zealand mining engineer, and officials from FennoScandia. Clarke alleges that the avowed goal of the meetings was to oust him as President of DRX.

On December 5, 1989, the DRX Board of directors did vote, over Clarke's objection, to remove him as President, CEO, and Chairman of the Board.[11] At that meeting, defendant Hinks was elected acting President and remained in that position until February 1990, when defendant Fronk replaced him as President. Despite his ouster from his executive positions, Clarke remained a director of DRX until the March 27, 1990 meeting at which the management sponsored slate of proposed directors defeated a slate supported by Clarke.

On April 6, 1990, Clarke filed the instant Complaint, alleging violations of Sections 14(a) and 13(d) of the Federal Securities Laws, and a violation of Del. Code Ann. tit. 8, § 213 (Supp. 1988) , which establishes limitations in determining the record date for

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11 Throughout the remainder of this Opinion, when referring to Clarke's ouster as President, Chairman of the Board and CEO, the Court will simply refer to it as Clarke's "ouster as President."

an annual stockholders meeting. The Court placed this case on an expedited trial schedule because of concerns regarding DRX's financial stability, and conducted a bench trial in late December, 1990.

II. ALLEGATIONS

Specifically, Clarke contends that the defendants who were elected directors at the March 27, 1990 annual board meeting of DRX, Inc. have fraudulently omitted and misstated material facts in the management proxy statement issued in connection with the March 27, 1990 shareholders meeting, in violation of § 14 (a) of the Securities Exchange Act of 1934 ("14(a)"), 15 U.S.C. § 78n(a) (1988). In support of this claim, Clarke asserts that the management proxy material should have contained information regarding (1) the alleged FennoScandia conspiracy[12]; and (2) the resignation of George Blakey as a director of DRX, Inc.

Clarke also asserts that FennoScandia, Hinks, Messegee and Colen constituted a "group" under Section 13(d) of the Securities Exchange Act of 1934, and thus were required to file a Schedule 13D disclosure statement ("13D") pursuant to 15 U.S.C. § 78m(d) (1988).

Clarke further claims that the March 27, 1990 shareholder meeting was invalid first, because Blakey had resigned as a director, rendering his vote in setting the meeting invalid, and second, because there was no record date, the meeting was held in violation of Del.

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12 Clarke alleges that the directors of DRX conspired with Fennoscandia in order to oust Clarke as President of DRX.

Code Ann. tit. 8, § 213. Clarke seeks a declaration that the directors elected at the March 27, 1990 meeting were not validly elected, and thus a new election must be held, and an injunction prohibiting the directors from acting on behalf of DRX in the interim.

Defendants respond first, that no conspiracy existed and that Blakey's purported resignation as a director of DRX was never affected. Defendants also contend that the proxy materials and the fight letter pertaining to the March 27, 1990 shareholders meeting contained sufficient reference to Clarke's allegations of conspiracy, so that shareholders were put on notice.

Defendants further assert that no Schedule 13D disclosure was required because FennoScandia did not agree to act in concert with any entity to obtain shares of DRX, nor did Hinks, Messegee or Colen. As to the scheduling of the record date for the March 27, 1990 meeting, defendants assert that Del. Code Ann. tit. 8, § 213 was not violated because plaintiff misreads the statute.

III. ISSUES

In an Order dated October 30, 1990, this Court set out the issues to be resolved by trial:

> The trial will resolve the issue of whether the present directors of DRX acquired and/or hold their office by acts of fraud under the securities laws of the United States or common law fraud.
>
> In resolving this issue, the parties intend to introduce evidence regarding the following factual disputes:

a. The alleged conspiracy involving FennoScandia Bank Limited, and others;
b. The alleged secret agreements and other matters concerning the election, resignation and replacement of George G. Blakey as a director of DRX;
c. The alleged actions of various stockholders to depress the price of DRX stock in order to affect plaintiff's holdings and position.

The legal issue . . . concerning the failure to set a record date at the meeting of the board of directors of DRX held an February 28, 1989, will be resolved at or following the trial . . . .

IV. FINDINGS OF FACT

Both parties submitted pre-trial and post-trial briefs. The following are the Court's findings of fact.[13]

A. The Blakey Resignation

After reviewing George Blakey's resignation letter and listening to his testimony during trial, the Court finds that he did not intend for his resignation to be unequivocal. The Court finds that Blakey conditioned his resignation upon its acceptance by Clarke, then President of DRX. The Court further finds that Clarke did not accept Blakey's resignation, as

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13 In arriving at its Findings of Fact, the Court took into consideration the credibility of witnesses, rejecting certain testimony as not credible where noted.

is evidenced by numerous letters and communications Clarke had with other Board members. Specifically, in a December 4, 1989 letter to the two other DRX Board members, Howard Butcher and George Hartnett, Clarke wrote:

> George Blakey has indicated his desire to retire from the board of DRX but I have not yet accepted his resignation, as I believe that tomorrow's board meeting is important and that he should attend, representing as he does the interests of a large number of shareholders in the U.K. George has agreed to defer his resignation and will make a decision based on the outcome of the meeting.

DX-1 (emphasis added). The evidence at trial established that following Blakey's attempted resignation, Clarke continued to refer to Blakey as a director.[14] At trial Clarke repeatedly attempted to explain away these references to Blakey as a director by stating that he (Clarke) had continued to so refer to Blakey out of "habit"[15] The court explicitly rejects Clarke's testimony on this issue, and finds that Clarke did not accept Blakey's resignation.

B. The Secret Director Plan

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14 See e.g., DX 19, 20, 21, 23, 26, 27, 29, 30, 31, 33, 37, 38, 39 and 47.

15 See e.g., Transcript ("Trans.") I at 166, 172, 175, 178, and 180.

Plaintiff alleges that at a March 6, 1990 meeting in London, defendant Howard Butcher promised the British investors that Blakey would resign as a director of DRX following DRX's next annual meeting, and that Blakey would be replaced by Ms. Emily McLoughlin, a representative of one of the British institutions. The Court finds that no "Secret Director Plan" was entered into, despite the March 8, 1990 facsimile letter from Jack Rice (of Third Mile Investment PLC, Great Britain) to Howard Butcher which stated in pertinent part:

> I have been asked by all the institutions ... that you kindly confirm by fax the commitment you gave at the meeting, that our representative will be adopted to the board immediately following the AGM (Annual General Meeting). I look forward to receiving this confirmation as soon as possible please.

PX-11. It is undisputed that the British investors did indeed desire such a commitment. However, many persons present at the March 6, 1990 meeting, including Philip Slade of the British investment firm of Strauss Turnbull and Peter Clarke of the British investment firm of Hill Samuel, testified that Butcher told Rice that no commitment could be given, but that if a vacancy on the DRX board arose, DRX would consider a representative of the British investors to fill the slot.[16] In his deposition, Rice stated that the March 8, 1990 facsimile letter was, in effect, a bargaining ploy in an

---

16 See e.g., Peter Clarke deposition ("depo.") at 17; Rice depo. at 4; Fronk depo. at 170-71; Slade depo. at 7-8; Butcher depo. 146-47.

attempt to force Butcher to give the British investors the commitment they wanted. Rice depo. at 4. Based on the above mentioned testimony which the Court credits as truthful, the Court finds that Butcher did not give any commitment to Rice, but simply stated that the DRX directors would consider a representative of the British institutions to fill a vacancy on the DRX board if one arose.

C. The "FennoScandia Conspiracy"

1. The Alleged Verbal Extension of the Alexandra Mining Loan.

Clarke's claims ultimately stem from a March 17, 1989 meeting Clarke had with David Hugh Adamson ("Adamson") , Executive Director of FennoScandia Bank, in which Clarke claims that Adamson verbally agreed to an extension of the loan that FennoScandia Bank had earlier negotiated with him for Alexandra Mining. On this issue, the Court finds that no such extension was granted by FennoScandia Bank. Specifically, Clarke failed to produce any evidence at trial to prove that Adamson gave Clarke an oral extension, other than Clarke's own testimony, which the Court rejects. See Tr. I at 77; II at 420.

2. The London Meetings with Brown and Webster.

It is undisputed that during the week of April 20 through 28, 1989, at the behest of defendant Warren Hinks, FennoScandia officials met with Allan Brown, a New Zealand mining engineer and consultant, and Peter Webster, a disgruntled former director of Alexandra Mining, who was fired by Clarke in December, 1988.

The record shows that Hinks hired Brown as a consultant to look into the possibility of ousting Clarke as President, Chairman of the Board, and chief Executive Officer ("CEO") of DRX through the consent procedure provided for under Delaware law, Del. Code Ann. tit. 8, § 228, and that Brown in turn hired Webster to accompany and assist him in this endeavor.

Contrary to Webster's testimony during trial, the Court finds that during the London meetings FennoScandia officials did not allow Webster or Brown to see any of the confidential loan documentation pertaining to the Alexandra Mining loan, including the April 28, 1989 letter in which FennoScandia informed Clarke that they would not renew the Alexandra Mining loan. This finding is primarily influenced by the court finding that Webster is not a credible witness because (1) Webster was hostile to Clarke (because Clarke had terminated him from Alexandra Mining) , until Clarke gave Webster, who was at that time in a poor financial situation, a financial stake in the outcome of this litigation and paid him a substantial sum for his testimony; and (2) Webster claimed that he had seen the non-renewal letter but had not shown it to Hinks, the person who paid him (and Brown) to got just such information (regarding how to depose Clarke as President) , which the Court finds untenable.

Further, Moreton G. Hall ("Hall") , an English Barrister employed as in-house counsel to FennoScandia Bank, who was present at the meetings in London with Brown and Webster during the week of April 20 through 28, 1989, testified at trial that the Alexandra Mining loan documentation file and the non-renewal letter were not shown to Webster. Tr. IV at 944. The Court finds Hall to have been a highly credible witness,

and his testimony was in direct conflict with Webster's testimony. Specifically, Hall testified, and the Court finds, that the non-renewal letter was not drafted until after Webster and Brown had left the bank's offices on April 28, 1989, and thus the letter could not have been shown to Webster at the April meeting. Tr. IV at 935.

3. The Brown/Webster Plan.

The Court finds that the plan proposed to FennoScandia Bank by Brown and Webster ("the Brown/Webster Plan") at the behest of Hinks, was a plan to oust Clarke using the "consent" procedure under Del. Code Ann. tit. 8, § 228, The Court finds that FennoScandia rejected this plan, and did not agree to act in concert with Brown, Webster or Hinks in any manner with regard to Clarke. The Court further finds that the "consent" procedure was never implemented to oust Clarke, Tr. V at 1081, and that Clarke was ousted for cause by the directors of DRX, who never discussed the matter with FennoScandia. Tr. IV at 888, III at 579.

4. Non-Renewal of the Alexandra Mining Loan.

The Court rejects plaintiff's contentions that FennoScandia entered into an implicit agreement with Brown, Webster and Hinks to oust Clarke.

The court finds that after FennoScandia decided not to extend the Alexandra Mining loan, and gave Clarke notice of this decision, FennoScandia pursued a plan to get repayment of the loan. Tr. V at 1088. Specifically, after FennoScandia sent Clarke the April 28, 1989 non-renewal letter, in response to a request

from Clarke, FennoScandia agreed to put the loan on a demand basis, as long as Clarke paid all interest due as of June 30, 1989, and continued to pay the interest monthly in advance, Tr. V at 1089. Clarke later decided not to sign the agreement. Tr. IV at 992. Additionally, in a letter dated October 11, 1989, FennoScandia offered to sell the Alexandra Mining loan to Clarke for $900,000 (U.S.), approximately 25% of the total amount due under the loan, which proposal would have transferred the disputed DRX shares back to Clarke once the $900,000 was paid, and removed Clarke from his personal guaranty of the Alexandra Mining loan. Tr. IV at 994-95. Clarke rejected this proposal as well. Id at 995.

5. Henry Colon's and James Messegee's Alleged Conspiracy with FennoScandia Bank.

As a preliminary matter, the Court notes that the issue of Whether Henry Colon and James Messegee depressed or attempted to depress the price of DRX stock is an issue that is before the Court, contrary to plaintiff's assertion to the contrary. See Order (October 30, 1990) (C.A. 90-161-JJF).

With regard to this issue, the Court finds that Colen and Messegee did not depress or attempt to depress the price of DRX stock. Clarke failed to submit any evidence to support such an assertion, other than his own testimony, and PX-21, a memorandum dated October 31, 1989 from Randy Martin to Clarke, in which Martin asserts that Colen was attempting to

manipulate the price of DRX stock.[17] The Court accepts Colen's testimony, and finds that he did not encourage anyone to sell their DRX shares, Tr. IV at 66566, particularly because it is against logic that a man of modest means would want to lower the value of one of his major assets. When Micromin was merged into DRX, the 200,000 shares Colen received from the merger were worth approximately $300,00.00 ($1.50/share). At the time of trial, the same shares were worth approximately $0.10/share.

The Court finds Colon to have been a credible witness at trial. The Court finds that while Colen submitted a proposal to FennoScandia Bank ("the Colen proposal") in order to enlist FennoScandia's assistance, FennoScandia never entered into any agreement with Colen. The Court finds, as Adamson testified, that the Colen proposal was placed into a file and never considered by FennoScandia. Tr. IV at 990. The Court finds, as Colen testified, that far from being part of any conspiracy to oust Clarke, Colen actually voted against two of the candidates for election to director on the management slate at the March 27, 1990 annual meeting. Tr. III at 678. In sum, the Court finds that Colen never entered into any agreement to oust Clarke as President of DRX. Tr. III at 671, 675, 676, 677.

As to James Messegee, the Court finds that Messegee never entered into any agreements with FennoScandia or any other person or group to oust Clarke as a director of DRX. The Court finds, as Messegee testified, that while Messegee met with Hinks and Brown to discuss the financial mismanagement of

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17 At trial, Fronk testified that the contents of PX-21 were dictated "word-for-word" by Clarke. Trans. IV at 847-48.

DRX and Brown's upcoming trip to London to meet with FennoScandia, messegee never knew that Brown or Hinks had a plan to oust Clarke. Tr. III at 781. The Court finds Messegee to have been a credible witness at trial, and accepts his testimony on this matter as true. See e.g. Tr. III at 703, 704; IV at 778-787.

D. The Webster Statement and Affidavit

On March 10, 1990, Peter Webster signed a statement regarding his recollection of the meetings he and Brown had with FennoScandia Bank officials in London from April 20 through 28, 1989 (PX-20). On March 14, 1990, Webster also signed an affidavit concerning among other things, his recollection of the London meetings (PX-8). In its poet-trial ruling on admissibility of evidence, the Court overruled. defendants' objection to these exhibits based an hearsay grounds, because they were not being admitted for their truth. See Memorandum opinion and order (February 1, 1991) (C.A. 90-161-JJF). As stated previously, the Court does not find Webster to be a credible witness, and therefore rejects his testimony on these issues in its entirety.

V. CONCLUSIONS OF LAW

A. The Blakey Resignation

Under Delaware law, the acceptance of a resignation is not absolutely required for it to be effective. See Del. Code Ann. tit. 8, § 141(b) (1983) ("§ 141"). The statute reads:

> Each director shall hold office until his successor is elected and qualified or until

his earlier resignation or removal, Any director may resign at any time upon written notice to the corporation.

Id. In Dillon v. Berg, 326 F.Supp 1214, 1223-24 (D.Del. 1971), aff'd 453 F. 2d 876 (3d Cir. 1971) , the Court held that an effective resignation under § 141 requires that it be (1) unequivocal; (2) in writing and (3) submitted to an agent of the Corporation. The Court stated that. "[the] necessity for written notice to the corporation before a director's resignation becomes effective clearly indicates an intent to outlaw secret, covert resignation in order to enable the other directors to know at all times the status of their fellow directors." Id. (emphasis added).

In interpreting Del. Code Ann. tit. 8. § 141(b), the Court stated that the purpose of the legislative provision was "to prevent a corporate director who desired to resign from having his status placed in doubt by a refusal or failure of the Board to act." Dillon, 326 F.Supp. at 1223. The Court went on to state that the "logical interpretation of the provision is that acceptance is no longer essential to effect a valid resignation by a director." Id. at 1224 (emphasis added). While acceptance is no longer "essential" to effectuate a resignation, the Court concludes that a director may make acceptance a condition of his resignation. The Court in Dillon addressed this issue by requiring that a resignation be "unequivocal" in order to be effective.

Folk on the Delaware General Corporation Law states that whether a director has resigned "is a question of fact to be determined from the circumstances of each case." Section 141.5.2. (1990). In addition, in Lasher v.

Inter-Continental Biologics, Inc., No. 950 (Del. Ch. June 14, 1984), Chancellor Brown stated:

> "[L]oose and ambiguous language will not be regarded as sufficient to prove the resignation of a corporate officer, at least where the subsequent acts and declarations of the officer are inconsistent with any such contention."

Slip Op. at 20 (citing 2 Fletcher, Cyclopedia of the Law of Private Corporations (Permanent ed. 1990) § 350.

Thus, the resignation issue in this case turns on whether Blakey was unequivocal when he wrote " would ask you therefore to regard this letter as formal notice of such resignation and to acknowledge acceptance thereof." PX-1. Considering all the facts relevant to Blakey's purported resignation, the Court concludes that Blakey's resignation letter was equivocal and that Blakey intended to condition his resignation upon its acceptance by Clarke. Clarke never accepted Blakey's resignation, and therefore Blakey's effort to resign was never affected. Since his resignation was never valid, Blakey was director of DRX for purposes of all DRX Board meetings since his election to the DRX Board, including the February 28, 1990 DRX Board meeting at which the annual meeting date was postponed.

B. The FennoScandia Conspiracy

In Connolly v. Labowitz, the Superior Court of Delaware, in and for New Castle County stated:

> Civil conspiracy is the combination of two or more persons or entities for an

> unlawful purpose or for the accomplishment of a lawful purpose by unlawful means, resulting in damage. Civil conspiracy is not an independent cause of action in Delaware.

519 A.2d 138, 143 (Del.Super. Ct. 1986) (citations omitted).

As a preliminary matter, the Court concludes that Brown and Webster were agents of Hinks. The Court concludes that FennoScandia Bank never entered into a conspiracy with Hinks, or his agents, Webster and Brown, to remove Clarke as President of DRX. The Court concludes that FennoScandia never entered into any agreement with regard to the ouster of Clarke as President of DRX. The Court also concludes that the overtures from FennoScandia to Clarke following FennoScandia's decision not to renew the Alexandra Mining loan clearly indicate that FennoScandia was pursuing a plan to work with Clarke to achieve repayment of the loan, not to oust Clarke, which is what Hinks and his agents were attempting to accomplish, The Court further concludes that while Hinks' goal -- the removal of Clarke as President of DRX -- might have coincided with FennoScandia's understandable preference that Clarke be replaced as President because the poor financial condition of DRX jeopardized their loan collateral, FennoScandia's actions after refusing to renew the Alexandra Mining loan were inconsistent with Hinks' goal. Specifically, the Court concludes that FennoScandia's objective was to achieve repayment of the loan, Tr. V at 1088, while Hinks' goal was to oust Clarke.

Further, since FennoScandia had loaned DRX $1,000,000 to keep it solvent, it is certainly understandable that FennoScandia would seek to have one of its representatives elected to the DRX board.

As to Colen and Messegee, the Court concludes, based on their respective testimony, that they did not conspire with any persons or entities to remove Clarke as President of DRX.

With regard to the alleged conspiracy between Hinks, Webster, and Brown, the Court concludes that no such conspiracy existed. Webster and Brown were merely agents of Hinks, and FennoScandia made no agreement with them.

Thus, the Court concludes that FennoScandia, Colen, Messegee, and Hinks did not enter into any conspiratorial agreements with any Person(s) or entity to remove Clarke as President of DRX.

C. **Violations of Sections 14(a) and 13(d) of the Federal Security Laws**

1. Section 14(a).

Section 14(a) of the Securities Exchange Act Of 1934 ("§ 14(a)") provides in pertinent part:

> It shall be unlawful for any person ... in contravention of such rules and regulations as the (Securities and Exchange) Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors,

> to solicit or permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section (12) of this title.

15 U.S.C. § 78n(a) (1988). In interpreting § 14(a), the United
States Court of Appeals for the Third Circuit has stated:

> Its [14 (a)'s] language dictates that as a prerequisite to recovery, a complainant initially must prove that his proxy was solicited in contravention of an SEC rule or regulation. In addition, he must prove injury. Finally, he must demonstrate a causal relationship between the violation of the rule or regulation and the injury.

Ash v. GAF Corp., 723 F.2d 1090, 1092-93 (3d Cir. 1983) (citations omitted).

To establish a violation of a Securities and Exchange Commission ("SEC") Rule, plaintiff relies on Rule 14 (a) -9 (a) , which provides:

> No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omit; to state any

> material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

17 C.F.R. § 240-14a-9(a) (1989).

In order to succeed on his claim under § 14(a) and Rule 14a-9, plaintiff must show an omission or misstatement in the proxy statement, and that the omission or misstatement was material. See TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 444 (1976). "An omitted [or misrepresented] fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." TSC Industries, 426 U.S. at 449.

Plaintiff contends that the proxy statement issued by the DRX Board in connection with the March 27, 1990 shareholders meeting failed to disclose the conspiracy among FennoScandia, Hinks, Messegee and the DRX directors, and that this omission was material. The Court concludes that there was no material omission or misstatement in the proxy statement because there was no conspiracy.

Furthermore, the Court concludes that the Proxy Statement and accompanying fight letter were sufficient to put any reasonable investor on notice as to Clarke's allegations. The Proxy Statement pertaining to the March 27, 1990 annual meeting of DRX shareholders contained the following language:

FennoScandia Nominees Limited ("FennoScandia") received 4,722,085 of such shares (the "FennoScandia Shares") as a result of a default by Alexandra Mining Company (Bermuda) Limited ("AMC") on a loan to AMC (the "AMC Loan") from FennoScandia's affiliate, FennoScandia Bank Limited ... ("the Bank"). The AMC Loan was secured by a pledge of the FennoScandia shares pursuant to a Pledge Agreement with AMC. Following AMC's default, the Bank exercised its enforcement rights under the Pledge Agreement to permit FennoScandia to become the registered holder of the FennoScandia shares. As the record holder, FennoScandia may exercise all voting rights attached to the FennoScandia Shares until such time as the Bank can sell or otherwise dispose of the FennoScandia Shares. A trust of which Robert A. Clarke, a director of the Company who is not on the management slate of nominees for election at the Meeting, is the settlor is the controlling shareholder of AMC. Mr. Clarke had given a limited personal guaranty to the Bank as additional security for the AMC Loan.

PX-9, at p. 2 n.l.

The Proxy Statement further reads:

In January 1990, Alexandra Clarke, the wife of Robert A. Clarke, instituted a stockholders' derivative suit against the

> Company [DRX) and FennoScandia Bank Limited (the "Bank"), seeking $40 million and alleging, among other things, that the Bank conspired with former employees of the Company to drive down the price of the Company's Common Stock so that Mr. Clarke was unable to secure substitute financing for the AMC (Alexandra Mining Company) loan The AMC loan is personally guaranteed in part by Mr. Clarke and secured by 4,722,085 shares of the Company's Common Stock. See "Securities Ownership." The Board, other than Mr. Clarke, believes that there is no substantiation to such claims. The Bank plans to dismiss the suit on the grounds that Mrs. Clarke is not a proper representative of the stockholders.

PX-9, at p. S.

Additionally, in a "fight letter" to DRX stockholders dated February 28, 1990, Butcher wrote:

> Clarke has contested the foreclosure, alleging, among other things, that disgruntled former employees have conspired and are conspiring with FennoScandia to drive down the price of DRX shares in order to acquire control of DRX. Alexandra Mining instituted a suit against FennoScandia in London in December 1989 .... Shortly thereafter, all the directors of Alexandra Mining, other than Clarke, resigned from its board.

> On numerous occasions over the past eight months, Clarke has urged the other DRX Board members to institute proceedings against FennoScandia. They have rejected Clarke's requests on the grounds that Alexandra Mining's dealings with FennoScandia are Alexandra's and Clarke's business, and unrelated to DRX. Further, the Board, other than Clarke, is aware of no evidence to indicate that FennoScandia has harmed DRX in any way.

PX-10, at p. 2.

Notwithstanding the Court's conclusion that there was no conspiracy, the Court concludes that these portions of the DRX defendants' proxy statement and fight letter more than adequately alerted any potential investor to Clarke's contentions with regard to the alleged conspiracy.

2. Section 13(d)

Under Section 13 (d) of the securities and Exchange Act of 1934 a "group" which directly or indirectly acquires the beneficial ownership of more than 5% of the stock of a company must file a statement with the Securities and Exchange Commission. Title 15 U.S.C. § 78(m)(d)(1) (1988). Under this section, when a "group" as defined in the statute agrees to act in concert to acquire shares, it must so disclose. See Bath Indus., v. Blot, 427 F.2d 97, 102 (7th Cir. 1970). The Court concludes that since FennoScandia, Hinks, Messegee, and Colen did not act

in concert to acquire the shares of DRX, section 13(d) is inapplicable and no 13(d) disclosure was required.

D. Del. Code Ann. tit. 8, § 213

On January 20, 1990, the Board selected March 6, 1990 as the data of the Annual Meeting, and February 14, 1990 as the Record Date. On February 28, 1990, the Board adopted a resolution postponing the Annual Meeting until March 27, 1990, but did not set a new record date.

Del. Code Ann. tit. 8, § 213 (Supp. 1988) states in pertinent part:

> In order that the corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, the board of directors may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the board of directors, and which record date shall not be more than 60 nor less than 10 days before the date of such meeting If no record date is fixed by the board of directors, the record data for determining stockholders entitled to notice of or to vote... shall be at the close of business on the day next preceding the day on which notice is given .... A determination of stockholders of record entitled to notice of or to vote ... shall apply to any adjournment of the meeting, provided, however, that the board of directors may

> fix a new record date for the adjourned meeting.

Thus, the two limitations in fixing a record date are (1) that the record date cannot precede the date on which it was fixed by the board, and (2) that the record date cannot be more than 60 nor less than 10 days before the date of the annual meeting. Neither occurred here. First, the record date was February 14, 1990. The DRX Board fixed that record date on January 24, 1990 and never moved it. Second, since the record date was February 14, 1990 and the meeting date was March 27, 1990, no violation occurred.

Clarke contends that the record date for the originally scheduled meeting cannot automatically be the record date for the rescheduled meeting, if when the board of directors rescheduled the annual meeting they were silent as to a record date. in essence, plaintiff claims that because the February 14, 1990 record date preceded the rescheduling of the Annual Meeting on February 28, the rescheduling of the Annual meeting was invalid.

The Court rejects this interpretation. Plaintiff attempts to read in a third restriction, that the record date cannot precede the date on which the board sets the meeting date. No such restriction exists. Thus, the Court concludes that the record date was validly set under Del. Code Ann. tit. 8, § 213.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT A. CLARKE, Plaintiff,	:	
V.	:	Civil Action No. 90-161-JJF
DRX, INC., HOWARD BUTCHER IV, GEORGE G. BLAKEY, RUDI P. FRONK, GEORGE J. HARTNETT, WARREN M. HINKS, JR., JAMES MARTIN PAUL R. SUTTON, JAMES MESSEGEE, HENRY COLEN and FENNOSCANDIA BANK LIMITED, Defendants,	:	

MEMORANDUM AND ORDER

On December 10, 1990, defendants FennoScandia Bank Limited ("FennoScandia") and Paul R. Sutton ("Sutton") filed a motion pursuant to Fed. R. Civ. P. 37 in the United States District Court for the District of Delaware, "for an order prohibiting plaintiff from introducing evidence on the issue of whether Robert A. Clarke ("Clarke" or "plaintiff") and FennoScandia entered into an oral agreement to modify the written loan agreement between FennoScandia and Alexandra Mining Company ("Alexandra Mining") to extend the term of a loan from FennoScandia to (Alexandra Mining Company] beyond June 30, 1989." Alexandra Mining Company ("Alexandra Mining") is a

Bermuda Corporation controlled and solely owned by plaintiff, Robert A. Clarke ("Clarke") . Clarke is a former director, President, Chairman of the Board, and Chief Executive Officer ("CEO") of defendant DRX, Inc. ("DRX") On behalf of Alexandra Mining, in June of 1987 Clarke negotiated a $4.7 million (Canadian) loan from defendant FennoScandia Bank Limited ("FennoScandia") The loan was ultimately secured by approximately 30% of the outstanding common stock of DRX, after the initial collateral (shares in McFinley Red Lake Mines) was exchanged for shares in DRX, with FennoScandia's permission. Following two extensions granted by FennoScandia, the loan was due on June 30, 1989.

FennoScandia requested that plaintiff produce all Alexandra Mining Board minutes or drafts of minutes from 1988 to the present. In November, 1990, plaintiff's counsel certified to the Court that all responsive documents within the possession, custody and control of the plaintiff or the entities with which he is affiliated had been produced, however it now appears that only some Alexandra Mining minutes had been produced. Counsel for FennoScandia advised plaintiff's counsel on a few occasions that production was incomplete. On November 28, 1990, during a discovery conference, plaintiff's counsel notified FennoScandia that additional Alexandra Mining Board minutes existed, but had not been produced because plaintiff was unable to obtain them from his Bermudian counsel, due to nonpayment of their legal fees.

1. ISSUE

As a factual matter underlying his legal claims, plaintiff claims that on March 17, 1989, David Hugh

Adamson ("Adamson"), Executive Director of FennoScandia Bank, verbally agreed to an extension of the Alexandra Mining loan past the June 30, 1989 due date. Plaintiff's evidence regarding the alleged oral extension apparently consists solely of his own testimony on this matter.

Defendants assert that the Alexandra Mining Board minutes, if silent with respect to any alleged verbal extension, would impeach Clarke's claim that there was a verbal extension. Defendants claim that: [p]laintiff's failure to produce the [Alexandra Mining] documents is inconsistent with the representations of his counsel that all documents subpoenaed from [Alexandra Mining] have been produced, and his failure to timely inform FennoScandia that such documents had not been produced has prejudiced the defendants by withholding crucial evidence and by failing to inform defendants of this withholding in time sufficient for defendant to obtain the documents through compulsory process."

II. DISCUSSION

Federal Rule of Civil Procedure 37(b) (2) provides:

> If a party ... fails to obey an order to provide or permit discovery .... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or

prohibiting that party from introducing designated matters into evidence.

The Court concludes that even if plaintiff was unable to produce the Alexandra Mining documents because they are in the possession of his Bermudian counsel who refuses to relinquish them due to non-payment of legal fees. Clarke nonetheless had a duty to disclose the existence of such documents to FennoScandia, especially in light of the fact that FennoScandia explicitly asked for such documents by name. Litigants have a duty of candor during discovery, and during all stages of trial, which duty Clarke breached. The Court concludes that FennoScandia was indeed prejudiced by Clarke notifying them at the "eleventh hour," one week before trial was to begin, leaving defendants with insufficient time to obtain the documents through compulsory process.

IT IS HEREBY ORDERED that:

1. Defendants' Motion. for Order Precluding Plaintiff from Supporting a claim is GRANTED.

2. Defendants' application for fees and expenses is DENIED.

\Joseph J. Farnan\
UNITED STATES DISTRICT JUDGE

February 1, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT A. CLARKE, Plaintiff,	:	
V.	:	Civil Action No. 90-161-JJF
DRX, INC., HOWARD BUTCHER IV, GEORGE G. BLAKEY, RUDI P. FRONK, GEORGE J. HARTNETT, WARREN M. HINKS, JR., JAMES MARTIN PAUL R. SUTTON, JAMES MESSEGEE, HENRY COLEN and FENNOSCANDIA BANK LIMITED, Defendants,	:	

MEMORANDUM AND ORDER

Trial in the above captioned case commenced in late December, 1990. The Court reserved all rulings an the admissibility of evidence for post-trial decision. Following the conclusion of trial, the parties submitted their objections to exhibits. The issue of the admissibility of the objected to evidence is now before the Court for rulings. All evidence not objected to by any party is admitted. An to these exhibits, the Court concludes as follows:

As to PX-5 (June 9, 1989 memorandum from Rudi P. Fronk to the DRX, Inc. Board), PX-7 (October 31, 1989 letter from Robert A. Clarke to Jan Ankacrona) , PX-11 (March 9, 1990 facsimile from Jack

Rice to Howard Butcher) , PX-14 (March 1, 1989 letter from Howard Butcher to Sedate, Inc.), PX-21 (October 31, 1989 memorandum from Randy Martin to Robert A. Clarke), PX-24 (FennoScandia file note regarding the Alexandra Mining loan) , PX-62 (NASDAQ Monthly Reports for DRX Inc. stock from October, 1988 through February, 1990), and PX-69 (phone records of Peter Webster) , the hearsay objections are overruled.

As to PX-8 (affidavit of Peter Webster) , PX-20 (statement of Peter Webster) , and PX-26 (affidavit of Sally Ann Nicolson) , the hearsay objections are overruled because the exhibits are not hearsay. PX-8, PX-20, and PX-26 are not being admitted for the truth of the matter asserted.

As to FennoScandia Bank's objection to certain portions of the deposition testimony of Laurence Howard Nichol ("Nichol") because of hearsay and lack of foundation, the objections are overruled.

IT IS HEREBY ORDERED that:

1. With regard to exhibits numbered PX-5, PX-7, PX-11, PX-14, PX-21, PX-24, PX-62, and PX-69, defendants' objections are overruled and the exhibits are admitted.

2. With regard to exhibits numbered PX-8, PX-20, and PX-26, defendants' objections are overruled and the exhibits are admitted, but not for the truth of the matter asserted.

\Joseph J. Farnan\
UNITED STATES DISTRICT JUDGE

February 1, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ROBERT A. CLARKE,

Plaintiff, ORDER

- against - 94 Cv. 1598 (MGC)

MORETON B. HALL, D. HUGH ADAMSON, and FENNOSCANDIA BANK LIMITED,

Defendants,

----------X

CEDARBAUM, J.

The complaint alleges that "[t]his is an equitable action arising from fraud by the defendants in a trail of a federal question in the United States District Court for the District of Delaware." This action appears to be a collateral attack on a judgment entered in the United States District Court for the District of Delaware in an action entitled Clarke v. DRX, Inc., et al., 90 Civ, 161 (JJF).

The Clerk is hereby directed to transfer this action to the District Court for the District of Delaware for further proceedings.

SO ORDERED.

Dated New York, New York
March \28\, 1994

\Miriam Goldman Cedarbaum\
MIRIAM GOLDMAN CEDARBAUM
United States District Judge

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT A. CLARKE	:	
	:	
Plaintiff,	:	
v.	:	Civil Action No.
	:	94-185- JJF
MORETON B. HALL,	:	
D. HUGH ADAMSON and	:	
FENNOSCANDIA BANK	:	
LIMITED,	:	
Defendants.	:	

Robert A. Clarke, Pro Se Plaintiff.

Jon E. Abramczyk, and Seth D. Rigrodsky, of MORRIS NICHOLS ARSHT & TUNNELL, Wilmington, Delaware. James E. Nesland, and William J. Leone, of IRELAND STAPLETON PRYOR & PASCOE, Denver, Colorado, Attorney's for Defendant.

MEMORANDUM OPINION

December 30, 1994

Wilmington, Delaware

\Joseph J Farnan Jr.\
FARNAN, District Judge

Presently before the Court a several submItted by Defendants, Moreton B. Hall, P. Hugh Adamson, and FennoScandia Bank, Limited ("Defendants") and one Motion submitted by Plaintiff Robert A. Clarke ("Plaintiff"). Defendants ask this Court to grant its Motion to Dismiss Plaintiff's Complaint and Defendants Motion for Attorney Fees and Sanctions (D.I. 6) Additionally, Defendants filed a Motion to Dismiss Plaintiff's First Amended Complaint and Motion for Attorneys Fees and Sanction (D.I. 14). Plaintiff asks this Court to grant his Motion for Leave to File a Second Amended Complaint (D. I. 18).

I. BACKGROUND

Plaintiff initiated this action in the United States District Court for the Southern District of New York. Plaintiff seeks to set aside the February 1, 1991 judgment of this Court in Clarke v. DRX, Inc., et al., No. 90-161-JJF (D. Del. 1991), aff'd, 961 F.2d 207 (3rd Cir. 1992), cert denied, 113 S. Ct. 208 (1992), rehearing denied, 113 S. Ct. 645 (1992), pursuant to Fed, R. 60(b). Characterizing Plaintiff's Complaint as a. "collateral attack on a judgment entered in the United States District Court for the District of Delaware," Judge Cedarbaum of the Southern District of New York ordered a transfer of this action to the District of Delaware (D.I. 4).

The judgment at in plaintiff's present litigation, Clarke v. DRX, Inc., et al. No. 90-161-JJF, found against all of plaintiff's claims against DRX, Inc., directors of DRX, and FennoScandia Bank Limited. In

this case, plaintiff is suing FennoScandia Bank and two individual defendants, both of whom testified at the trial. Plaintiff argues pursuant to Rule 60(b)(3), that the Judgment in Judgement in Clarke v. DRX, Inc., et al. No. 90-161-JJF, was obtained by fraud and as such, should be set aside. Plaintiff also argues that individual Defendants Hall and Adamson are liable under 42 U.S.C. § 1983 for any allegedly fraudulent testimony presented at that trial.

Defendants argue that Plaintiff's Complaint and Amended Complaint fail to state a claim upon which relief can be granted and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Defendants note that Plaintiff has previously litigated his claims in this Court and lost and that Fed. R. Civ. P. 60(b) is not applicable to the facts of this case. Defendants argue that Plaintiff fails to state a claim pursuant to Rule 60 (b) because he does not allege any evidence to establish the occurrence of fraud on the court. Defendant's also argue that witnesses in a civil trial are immune from liability related to their testimony. As such, Defendants contend that Plaintiff cannot maintain his claims against Defendants Hall and Adamson.

II. DISCUSSION

A. Standards of Review

1. Defendants/Motion to Dismiss

Federal Rule of Civil Procedure 12 (b) (6) governs Defendants' Motion to Dismiss. Defendants' Motion will succeed if, taking all the factual allegations as true, the complaint fails to state a claim entitling the plaintiff to relief. Fed. R. Civ. P. 12(b)(6); D.

P Enterprises v. Bucks County Community College, 725 F.2d 943 (3d Cir. 1984). To withstand a motion to dismiss for § 1983 claim, the plaintiff must allege "specific conduct violating the plaintiff's rights, the time and place of that conduct, and the identity of the responsible officials." Colburn v. Upper Darby Township, 838 F.2d 663, 666 (3d Cir. 1988). The court must evaluate the facts in the light most favorable to the plaintiff, Id. at 665.

2. **Relief From Judgment**

Federal Rule of Civil Procedure 60(b) provides "[o]n motion and upon such terms as are just, the court may relieve a party's legal representative from a final Judgment, order, or proceeding for the following reasons . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . ." A Rule 60(b)(3) Motion should be granted where the moving party demonstrates that the opposing party "engaged in fraud or other misconduct, and this conduct prevented the moving party from fully and fairly presenting [the] case." Stridiron v. Stridiron, 698 F.2d 204, 207 (3d Cir. 1983) Rule 60 relief provides an exceptional remedy and should be applied in deservedly rare cases. Boughner v. Secretary of Health Education and Welfare, 572 F.2d 976, 977 (3d Cir. 1978).

B. Analysis

1. The Original Complaint

Plaintiff did not file briefing opposing Defendants' Motion to Dismiss and Motion for Sanctions. Instead, Plaintiff filed a Proposed Amended

Complaint. In Plaintiff's original Complaint Plaintiff alleges that Defendants perjured themselves while testifying in the matter of Clarke v. DRX, Inc., et al, NO. 90-161-JJF, before this Court. Plaintiff argues that this alleged perjury constitutes fraud on the Court and as such, the prior judgement should be set aside pursuant to Rule 60(b).

Defendants argue that Rule 60(b)(3) doe not apply to allegations of fraud based on discovery of alleged perjury by a witness. Gleason v. Jandrucko, 860 F.2d 556, 559 (2d Cir. 1988). Additionally, Defendants claim that Plaintiff has not presented any new evidence to warrant an independent judgment to set aside the judgment of this Court in Clarke v. DRX, inc., et al., No. 90-161-JJF, pursuant to Rule 60(b).

"Fraud on the court" is that conduct which "threatens the very integrity of the Judiciary and the proper administration of Justice." Gleason v. Jandrucko, 860 F.2d 556, 559 (2d Cir.1988); see also Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245 (1944). In Gleason, the court held that "after discovered evidence of alleged perjury by a witness is simply not sufficient for a finding of 'fraud on the court.'" Gleason, 860 F.2d at 559 (quoting Hazel-Atlas, 322 U.S. at 245). Thus Plaintiff may not, by way of independent action, use Rule 60(b) to challenge the truthfulness of witness testimony of the prior proceeding. Gleason, 860 F.2d at 559.

Plaintiff seeks to set aside the original judgment of this court by alleging perjury by various defense witnesses. During the trial, Plaintiff had the opportunity to challenge the credibility of defense witnesses, and did so. The Court made specific findings of credibility for

these witnesses. Plaintiff does not challenge these findings with new evidence. Instead he tries to recycle credibility arguments which this Court has already heard and rejected.

Additionally, even accepting Plaintiff's allegations of witness perjury as true, "[a]fter-discovered evidence of alleged perjury by a witness is simply not sufficient for a finding of 'fraud on the court.'" Id. Thus, the Court will not entertain an independent action to challenge the, credibility of a witness where the credibility of that witness was addressed in the original proceeding. Id.

The Court finds that its previous determination of the credibility of defendant witnesses is applicable to this Motion, and that Plaintiff presents no evidence, which as a matter of law, rises to the level of fraud on the court. See Clarke v. DRX, Inc., et al., No. 90-161-JJF. Therefore, the Court finds that Plaintiff's original Complaint fails to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

2. The Proposed Amended Complaint

Plaintiff filed a "Proposed Amended Complaint" (D. I. 12) in lieu of an answering brief to Defendants' Motion to Dismiss. In response, Defendants filed a Motion to Dismiss the Amended Complaint and Motion for Attorneys Fees and Sanctions (D. I. 14) Plaintiff amends his claim of fraud on the Court in his Amended Complaint by arguing that Defendants' attorneys conspired with Defendants to present perjured testimony at trial.

As discussed, allegations of witness perjury are insufficient for a finding of fraud on the court.

Allegations of attorney involvement, however are more serious and can be shown to be fraud on the court. Cleveland Demolition Co., Inc. v. OSCINE Scrap Corp., 827 F.2d 984, 986 (4th Cir. 1987) In Cleveland Demolition, the plaintiff asked the court, pursuant to Rule 60(b), to set aside a verdict based on fraud, alleging that a defense witness and attorney conspired to present perjured testimony. Id. As evidence of the fraud, plaintiff pointed to a conflict between testimony presented at trial and certain records disputing that testimony. Id. As evidence of the conspiracy, the plaintiff simply argued that, as the witness's attorney, the attorney must have been a part of fabricating the testimony.

The court held that such "meager evidence falls woefully short of proving fraud on the court," Id. While acknowledging the egregious nature of attorney involvement in presenting perjured testimony, the court emphasized the fact that the plaintiff presented no evidence of much a situation. The court admonished against an automatic rule that would hold an attorney liable as an active participant any time a witness lies while testifying Id. at 987. The court also discussed the serious affect such a rule would have on the principle of finality. If such a rule were permitted, any dissatisfied party "could transform a perjury case into an action for fraud on the court simply by alleging that an attorney was present." Id.

In this case, Plaintiff provides no new evidence to demonstrate attorney involvement in the presentation of allegedly perjured testimony. Plaintiff's claims reiterate the arguments he presented in Clarke v. DRX, inc., et al. No. 90-161-JJF, which this Court reviewed and rejected. Although Plaintiff has sent several letters to

the Court purporting to prevent evidence of the fraud (D. I, 23, 25, 26), the Court finds this evidence repetitive of earlier arguments. Plaintiff's Complaint simply alleges that Defendants' attorneys must have been part of a conspiracy to defraud the court because, as the party's attorneys, they must have known the nature and falsity of Defendants testimony. Without more, this is insufficient to state a claim under Rule 60(b).

3. Plaintiff's Motion to File a Second Amended Complaint

Plaintiff included a Motion for Leave to File a second Amended Complaint in his answering brief to Defendants' Motion to Dismiss Plaintiff's Amended Complaint (D.I. 18). Plaintiff argues that the liberal pleadings requirements of Fed. R. Civ. P. 15 dictate the granting of his Motion.

Federal Rule Of Civil Procedure Rule 15 provides that leave of court to amend pleadings "shall be freely given when justice so requires." In this case the court does not believe justice will be served by allowing Plaintiff to amend his Complaint yet another time. Plaintiff failed to submit a copy of the Second Amended Complaint as required by Delaware Local Rule 15.1. Thus, the Court must decide Plaintiffs Motion based on the representations made in his answering brief. In his brief, Plaintiff again attempts to challenge the previously litigated and determined evidentiary issues by repackaging them in different language. As such, Plaintiff has not shown that he would present to the Court any new, legally cognizable claims in his proposed Second Amended Complaint.

C. Attorney Fees and Sanctions.

In both Motions to Dismiss, Defendants include Motions for Attorneys Fees and Sanctions. Defendants ask the Court to grant reasonable attorneys fees and to order Plaintiff to seek leave of court before filing any additional claims or motions related to this matter (D.I. 6, 14). Defendants argue that a reasonable examination of the law applicable to Plaintiff's claims would have revealed the lack of merit of his claims. Additionally, Defendants argue that Plaintiff is merely trying to re-litigate previously determined evidentiary issues. As such, Defendants contend that an award of reasonable attorney fee is appropriate.

The Court declines to impose Rule 11 sanctions in this case. Plaintiff represents in this matter and the Court in inclined to Plaintiff's lack of legal expertise rather than some other motive for his actions. The Court however, is mindful of the repetitive nature of Plaintiff's claim's and, will evaluate further applications by Plaintiff with stricter scrutiny. In this respect, the Court will enter an order prohibiting Plaintiff from filing any additional claims without obtaining permission from this Court.

III. CONCLUSION

The Court concludes that Plaintiff has failed to state a claim upon which relief can be granted in either his original complaint or his Amended Complaint. Therefore, Defendants' Motion to Dismiss the Complaint and Amended Complaint will be granted. The Court finds that an award of attorneys fees is not warranted in this case and will therefore deny Defendants Motions for Attorneys Fees and Sanctions.

Finally, the court does not find that justice will be served by allowing Plaintiff to file a Second Amended Complaint and therefore, Plaintiff's Motion to File a Second Amended Complaint will be denied.

An appropriate Order will be entered.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-7091

ROBERT A. CLARKE,
Appellant
V.
MORETON B. HALL;
D. HUGH ADAMSON;
FENNOSCANDIA BANK LIMITED

On Appeal from the United States District Court
for the District of Delaware
D.C. Civil No. 94-00185
District Judge: Honorable Joseph J. Farnan

Submitted under Third Circuit LAR 34.1(a)
October 12, 1995

BEFORE: GREENBERG and LEWIS, Circuit Judges,
and VANARTSDALEN, District Judge*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of Delaware and was submitted under Third Circuit LAR 34.1(a) on October 12, 1995.

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* Honorable Donald W. VanArtsdalen, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

On consideration whereof, it is now here ADJUDGED and ORDERED by this court that the order of December 30, 1994 be and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

\P. Douglas Sids\
Clerk

DATED: OCT 24 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-7091

ROBERT A. CLARKE,
Appellant
V.
MORETON B. HALL;
D. HUGH ADAMSON;
FENNOSCANDIA BANK LIMITED

On Appeal from the United States District Court
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D.C. Civil No. 94-00185
District Judge: Honorable Joseph J. Farnan

Submitted under Third Circuit LAR 34.1(a)
October 12, 1995

BEFORE: GREENBERG and LEWIS, Circuit Judges,
and VANARTSDALEN, District Judge*

(Filed: \Oct 24 1995\ 1995

MEMORANDUM OPINION OF THE COURT

GREENBERG, Circuit Judge.

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* Honorable Donald W. VanArtsdalen, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Robert A. Clarke appeals from an order entered in the district court on December 30, 1994, dismissing his complaint because he failed to state a claim on which relief could be granted. In the memorandum opinion accompanying the order, the district court set forth the background of the case, which we will not repeat. Clarke states that the issue on appeal is whether the court applied an incorrect standard under Fed. R. Civ. P. 60(b) when it dismissed the action. In particular, he contends that the district court should have considered the case under the provision of Rule 60(b) allowing a court "to entertain an independent action to relieve the party from a judgment" rather than under Rule 60(b)(3).

Exercising plenary review, we have concluded that, without regard to how Clarke's action is characterized, the district court appropriately dismissed his unmeritorious, vexatious complaint. In these circumstances we will affirm the order of December 30, 1994.

TO THE CLERK:

Please file the foregoing memorandum opinion.

\Greenberg\
Circuit Judge

DATED: \OCT 24 1995\

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ROBERT A. CLARKE,	:	\96\ Civ. \1598\
	:	(Judge \MGC\
Plaintiff,	:	
-against	:	Complaint
	:	
MORETON D. HALL; D. HUGH ADAMSON, and FENNOSCANDIA BANK LIMITED,	:	
	:	
Defendants.	:	

----------X

Summary of Action

1. This is an equitable action arising from fraud by the defendants in a trial of a federal question in the United States District Court for the District of Delaware. The plaintiff seeks monetary damages and other relief.

Jurisdiction and Venue

2. The Court has jurisdiction under 28 U.S.C. Section 1331 and F.R.C.P. Rule 60 and annotations. This matter is an extension and continuation of the District of Delaware action, Clarke v. DRX, Inc. et al., Civil Action No. 90-161-JJF, where jurisdiction was also based on 28 U.S.C. Section 1331.

3. Venue is proper in this District pursuant to 28 U.S.C. 1-391(b)(2). This is an independent action under F.R.C.P. Rule 60, and such actions may be filed in any competent venue which has jurisdiction. This

District is a competent venue because actions underlying this matter occurred therein, and plaintiff Robert A. Clarke ("Clarke"), and DRX, Inc. ("DRX"), were at relevant times resident.

The Parties

4. Clarke beneficially control 842,475 common shares of DRX, Inc. (" DRX") stock, and alleges, In an action now pending in the London High Court, that FennoScandia foreclosed on 4,722,085 DRX shares by fraud, and that they should be returned to a Clarke affiliate that FennoScandia bank Limited ("FennoScandia") alleges Is Clarke's alter ego. At times relevant to matters underlying this action, Clarke and DRX were resident at 159 East 61st Street, New York, New York 10021.

5. FennoScandia is a United Kingdom bank with offices in London, and is owned by a "savings and loan" with offices in New York.

6. Defendant D. Hugh Adamson ("Adamson") is a former director of FennoScandia, and its manager of International and United Kingdom banking. Adamson resides in England.

7. Defendant Moreton B. Hall ("Hall") is a former in-house counsel of FennoScandia, who also resides in England.

8. Clarke filed an action in the United States District Court for the District of Delaware ("Delaware Court") in April 1990, alleging that defendants to that action had violated United States securities laws by not disclosing material facts In a proxy statement to shareholders of DRX. Clarke asked the Delaware

Court to declare the election of directors unlawful, and sought other relief, including a declaration that all actions taken by the directors were null and void. The Delaware Court placed the matter on an expedited schedule, and a bench trial took place in December 1990 ("December Trial").

9. Adamson and Hall testified for FennoScandia. The Court, on February 1, 1991, found in favor of the defendants, and Issued a Memorandum Opinion stating that what transpired in 1989 between FennoScandia and representatives of Warren H. Hinks, Jr. ("Hinks"), a disaffected DRX employee, was central to the case. Hinks had sent Peter Webster ("Webster") and Alan Brown ("Brown") to London to persuade FennoScandia to call a loan to a Alexandra Mining Company (Bermuda) Limited ("Alexandra Mining"), a Clarke affiliate, secured by DRX shares.

10. FennoScandia told Brown and Webster that the loan to Alexandra Mining was not In default. Because there was no default on the loan, FennoScandia could not immediately foreclose on the shares. Instead, on April 28, 1989, FennoScandia sent Alexandra Mining a letter demanding repayment of the loan at June 30, 1989, and stating that "for the avoidance of doubt", it would not renew the loan ("non-renewal letter").

11. Hall testified at the December Trial that FennoScandia did not disclose to Webster or Brown that the loan was not being renewed beyond June 30, 1989. However, paragraph 1 an 2 of a memorandum from Brown to FennoScandia, dated May 4, 1989, clearly show that FennoScandia had in fact disclosed it was not renewing the loan beyond June 30, 1969.

12. Adamson testified at the December Trial that there was no agreement between FennoScandia and Hinks to obtain the voting rights on Alexandra Mining's DRX shares by foreclosure. Adamson lied, as FennoScandia admitted that it and Hinks only "went their separate ways" after the end of June 1989.

13. Adamson further testified that FennoScandia's intention regarding the loan after its meetings with Brown and Webster was to be repaid. However, a FennoScandia 13D Amendment shows that its Intention in foreclosing was representation on DRX's Board of Directors.

14. Hall's and Adamson's testimony for FennoScandia was Intended to induce the Court to believe that it was true and that Its should be relied upon. Hall and Adamson knew at the time that FennoScandia's Testimony was untruthful.

15. The Delaware Court relied on FennoScandia's Testimony in reaching judgment in its favor. FennoScandia's Testimony was material to the Delaware Court's decision to grant judgment in favor of FennoScandia.

16. Clarke has suffered material damage as a result of the foregoing.

17. Clarke was prevented from obtaining the benefit of his claim due to the defendants' fraud.

18. Clarke's losses include: these arising from his removal as a DRX director; those arising from denial of his actual and prospective profit opportunity through options and interests in DRX shares; costs and

expenses in the original action, and all of his subsequent costs and expenses.

19. There has been no fault or negligence by Clarke, whose claims in the Delaware Court were meritorious. Clarke has acted with clean hands throughout, and now has no adequate alternative remedy at law. Accordingly, the original judgment ought not in equity and good conscience remain undisturbed.

WHEREFORE, Clarke requests that the court:

(a) Strike FennoScandia's Testimony;

(b) Remand the original case for new trial, or reverse the judgment and grant judgment in favor of Clarke;

(c) Grant Clarke monetary damages for his losses, including costs and expenses, arising from the previous action;

(d) Grant Clarke his costs and expenses in this action;
and,

(e) Grant such other and further relief as may be just and proper.

BY \Robert A. Clarke\

Robert A. Clarke
Inverlussa, House
Achnamara
Argyll PA31 8PT
Scotland
tel: (01144) 54685 251

Dated: March 3, 1994 Pro Se Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT A. CLARKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 94-185-JJF
	)	
MORETON B. HALL; D. HUGH ADAMSON, and FENNOSCANDIA BANK LIMITED,	)	
	)	
Defendants.	)	

AMENDED COMPLAINT

Summary of Action

1. This is an equitable action arising from fraud by the defendants and their witnesses in a trial of a federal question in the United States District Court for the District of Delaware.

2. The plaintiff also alleges that the defendants are liable to him pursuant to 42 U.S.C. Section 1983(l), and that the individual defendants are not immune from suit. Plaintiff seeks declaratory judgments, money damages, and other relief, including a now trial.

Jurisdiction and Venue

3. The Court has jurisdiction under 28 U.S.C. Section 1331 and F.R.C.P. Rule 60 and

annotations. This matter is an extension and continuation of the District of Delaware action, Clarke v DRX, Inc. et al., Civil Action No. 90-161-JJF, where jurisdiction was also based on 28 U.S.C. Section 1331.

4. Venue is proper in this District pursuant to 28 U.S.C. 1391(b)(2), in that the events complained of herein substantially occurred within this District.

The Parties

5. Plaintiff, Robert A. Clarke ("Clarke"), beneficially controls 842,475 common shares of DRX, Inc. ("DRX") stock, and seeks the return to an affiliate of 4,722,085 DRX shares, in an action now pending in the High Court, London, which FennoScandia allegedly foreclosed on by fraud.

6. Defendant FennoScandia Bank Limited ("FennoScandia") is a United Kingdom bank regulated by the Bank of England, and was a defendant in Clarke v. DRX, Inc., et al., No. 90-161-JJF (D. Del. Feb. 1, 1991) ("Delaware action").

7. Defendant D. Hugh Adamson ("Adamson"), who testified in the Delaware action, was at time a director of FennoScandia, and manager of international and United Kingdom banking.

8. Defendant Moreton B. Hall ("Hall") also testified in the Delaware action, and was at that time FennoScandia's in-house counsel.

The Delaware Action

9. Clarke filed an action in this District in April 1990, alleging that the defendants to that action had violated United States securities laws by not disclosing material facts in a proxy statement to shareholders of DRX, and by not filing a 13D Amendment. Clarke asked the Court to declare the election of directors unlawful, and other relief including a declaration that all actions taken by the directors were null and void ab initio.

10. The Court placed the matter on an expedited schedule, and a bench trial occurred in December 1990. The Court found for the defendants, and, in its February 1, 1991 Memorandum Opinion, stated that what had transpired in 1989 between FennoScandia and representatives of Warren H. Hinks, Jr. ("Hinks"), a disaffected DRX employee, was central to the case. It was undisputed that Hinks had sent Peter Webster ("Webster") and Alan Brown ("Brown") to London to persuade FennoScandia to call a loan to Alexandra Mining Company (Bermuda) Limited ("Alexandra Mining"), a Clarke affiliate, which was secured by DRX shares.

11. Adamson testified that Brown and Webster were told that there was no default in the loan after FennoScandia consulted its London solicitors, Morton Rose. Because there was no default on the loan, FennoScandia could not immediately foreclose on the shares. Instead, on April 28, 1989, FennoScandia sent Alexandra Mining a letter demanding repayment of the loan at June 30, 1969, stating that "for the avoidance of doubt", it would not renew the loan ("non-renewal letter").

12. Hall testified that he did not show the non-renewal letter to Webster or Brown on April 28, 1989, during the course of a meeting with. them at FennoScandia's office.

13. Adamson testified that there was never any agreement between FennoScandia and Hinks to obtain the voting rights on Alexandra Mining's DRX shares.

14. Adamson further testified that FennoScandia's objective following its meetings with Brown and Webster was "to have the loan repaid and give the [DRX] stock back to Mr. Clarke."

The Defendants' Perjury

15. Adamson lied when he testified that there was never any agreement between FennoScandia and Hinks, as FennoScandia itself admitted, in its post-trial memorandum that "[b]y late June 1989, FennoScandia and Hinks followed separate paths (negotiation v. litigation) with inconsistent objectives (payment of the loan and release of the shares to Clarke v. litigation against DRX), and hired separate counsel." In other words, FennoScandia and Hinks were on the same path, with consistent objectives, and with the same counsel, from Ireland, Stapleton's April 21 retention, until "late June 1989". It appears the Court inadvertently overlooked FennoScandia's tacit admission of their two month agreement.

16. Adamson also lied when he testified that FennoScandia's objective after its meetings with Brown and Webster was "to have the loan repaid and give the [DRX] stock back to Mr. Clarke", as a 13D Amendment

filed by FennoScandia shows that its intention in foreclosing was "representation on the, [DRX] Board of Directors.". It appears the Court also inadvertently overlooked the ineluctable discrepancy between the 13D Amendment which was admitted into evidence during the trial, and Adamson's, testimony.

17. Hall lied when he testified that he had not disclosed, to Webster and Brown, that FennoScandia would not renew the loan beyond June 30, 1989, as Webster's testimony -- that FennoScandia did disclose that the loan would not be renewed beyond June 30, 1989 -- is clearly corroborated by paragraph 2 of a May 4, 1989, memorandum from Brown to FennoScandia ("Brown's Memorandum").

18. Further Adamson himself testified that Webster and Brown were "disappointed" when they were told the loan was not in default, after FennoScandia consulted Norton Rose, thereby openly admitting that confidential information - that there was no act of default -- was disclosed, as Brown's Memorandum also evidenced where, in paragraph 1, Brown candidly opened his "Review to date" with a summary of "last week's discussions re .. Alexandra Mines .. and the current situation re the inability to declare a default and activate the consent procedure". Brown's Memorandum was admitted an evidence in the trial, and it appears that the Court inadvertently overlooked this evidence of Hall's perjury.

Fraud on the Court

19. Adamson's testimony about FennoScandia's agreement with Hinks, and FennoScandia's intentions following the meetings with

Hinks' agents, and Hall's testimony about disclosure of the non-renewal letter, were intended to induce the Court to believe that such testimony was true and should be relied upon.

20. The Court materially relied on Hall's and Adamson's testimony, which Hall and Adamson know was false, in deciding to grant Judgment for FennoScandia.

Subsequently Discovered Evidence

21. Adamson swore an affidavit, filed as an exhibit to a Motion for Protective Order by FennoScandia on March 25, 1994, in an action pending against Clarke, in Colorado, in which he admits that Clarke visited him twice at his premises in Wymondham, Norfolk, first in December 1992, and again on November 4, 1993.

22. Adamson asserts in his affidavit that during the course of the December 1992 meeting, which he admits he consented to, Clarke "asked [him] to change [his] testimony and say that Mr. Moreton Hall had in fact showed the 'non-renewal' letter of April '89 to Messrs. Webster and Brown". This is nonsense, as Adamson never testified at trial on the allegation that Hall had shown the non-renewal letter, and thus Adamson could not "change" his testimony on something he had never testified about.

23. When Clarke reminded Adamson about Webster's account of the April 28, 1989, meeting with FennoScandia, when Adamson gave Webster and Brown checks for expenses, which Adamson admits, and Hall entered the meeting room with the non-renewal letter,

which he showed to Webster and Brown, Adamson protested: "yes, but I didn't show the letter". Clarke replied that it was never alleged that Adamson showed the letter; rather that Hall had done so in Adamson's presence. Adamson refused to swear an affidavit of what he had just said and told Clarke he would have "to subpoena him", adding that as far as he was concerned, the matter was "history". Adamson, by his use of words "yes, but I didn't show the letter", admits that the letter was shown, and that Hall showed it, as he as the only other FennoScandia officer in the meeting, and has admitted drafting the non-renewal letter as in-house counsel.

24. Clarke's November 4, 1993, visit was to ask Adamson if he would reconsider the request for an affidavit of what he had admitted to Clarke in December 1992. Adamson declined, repeating that the matter was "history'. His verbal admission to Clarke is, however, ground for this Court to require that he testify again.

Reason Underlying The Defendants, Fraud

25. FennoScandia is authorized by the Bank of England to conduct its banking business, and to maintain such authorization it, and its managers, must meet the criteria of Schedule 3 of the Banking Act 1987. Under English law, the matters alleged against FennoScandia, whereby it disclosed confidential information about Alexandra Mining to Hinks' agents, Brown and Webster, to whom it was not lawfully entitled to make such disclosure, would, had they been proven, give rise to the Bank of England revoking its authorization, as "if it appears to the Bank [of England] that .. any of the criteria specified in Schedule 3 to this

Act is not or has not been fulfilled", revocation is available sanctions

No Witness Immunity

26. Hall and Adamson, in taking the Oath administered by the Court, acted under color of law when testifying, and as such, their fraudulent testimony deprived Clarke of his due rights and privileges in this Court. In addition, their fraud subverted the very integrity of this Court, and the federal courts generally. For either or both. of the above reasons, Hall and Adamson have no protection from suit.

Count 1 (Declaratory Judgment)

27. Clarke incorporates and reasserts the allegations of paragraphs 1 through 26 of the foregoing, inclusive.

28. Clarke was prevented from obtaining the benefit of his claim due to the defendants' fraud, and in such circumstances he is entitled to a Declaration that the Judgment in favor of the defendants was obtained by fraud.

29. There has been no fault or negligence by Clarke, and his claims in this Court were meritorious. Clarke has acted with clean hands throughout, and has no adequate alternative remedy at law. Accordingly, the original judgment ought not in equity and good conscience remain undisturbed.

WHEREFORE, Clarke requests that the Court make a Declaration that FennoScandia obtained its judgment by fraud.

Count 2 (Declaratory Judgment)

30. Clarke incorporates and reasserts the allegations of paragraphs 1 through 29 of the foregoing, inclusive.

31. 42 U.S.C. Section 1983(l) provides that any person who, under color of any law [or] statute .... shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights [or] privileges secured by the Constitution of the United States, shall ... be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . ".

32. The defendants, in testifying fraudulently to the Court after taking the Oath administered by this Court pursuant to law, thereby acted under color of law to deprive Clarke of his rights to due process.

WHEREFORE, Clarke requests that the Court declare that the defendants deprived Clarke of his due process rights, and that they are liable to him for damages.

Count 3 (New Trial Or Reversal Of Judgment)

33. Clarke incorporates and reasserts the allegations of paragraphs 1 through 32 of the foregoing, inclusive.

34. As a proximate result of the defendants, fraud, Clarke was deprived of a fair trial. Now evidence from Clarke's meetings with Adamson was not available at trial. The now evidence clearly supports evidence

available at trial, but which the Court appears to have hitherto inadvertently overlooked.

WHEREFORE, Clarke requests that the Court order a new trial due to the defendants' fraud on the Court, and/or its mistake. In the alternative, Clarke requests that the Court strike Adamson's and Hall's testimony, and reverse the earlier Judgment.

Count 4 (Fraud -- Money Damages)

35. Clarke incorporates and reasserts the allegations of paragraphs 1 through 34 of the foregoing, inclusive.

36. As a proximate result of the defendant's fraud, Clarke has suffered material damage including losses due to his removal as a DRX director, denial of profit opportunities, and his costs and expenses both in the original action, and in this action.

WHEREFORE, Clarke requests that the Court grant him monetary damages in excess of $50,000,000; his costs and expenses in this action, and such other and further relief as is just and proper, including but not limited to exemplary damages or other punitive damages in the highest amount permitted by law.

Count 5 (Damages Pursuant To 42 U.S.C. 1983(l))

37. Clarke incorporates and reasserts the allegations of paragraphs 1 through 36 of the foregoing, inclusive.

38. As a proximate result of the defendant's violation of Clarke's due process, Clarke has suffered material damage as set forth in Paragraph 36 above.

WHEREFORE, Clarke requests that the Court grant him monetary damages in excess of $50,000,000; his costs and expenses in this action, and such other and further relief as is just and proper, including but not limited to exemplary damages or other punitive damages in the highest amount permitted by law.

By \Robert A. Clarke\

Robert A. Clarke
Inverlussa House
Achnamara
Argyll PA31 8PT
Scotland
tel: (01144) 54685 251

Pro So Plaintiff

Dated: June 1, 1994.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing AMENDED COMPLAINT were served by courier this 1st day of June 1994 upon:

Jon E. Abramczyk, Esq.
Morris, Nichols, Arsht & Tunnell
1201 N. Market Street
Wilmington, DE 19899
U.S.A.

\Robert A. Clarke\

ARTHUR JOHN COOK

1 New Cottages, Wasperton, Warwick CV35 8EB

I, Arthur John Cook, a Chartered Accountant living in Warwick employed by Saracen Cycles Limited states as under:

On Friday the 28th April 1989, I met Mr. Peter Webster, as a friend and ex-colleague at United Guarantee, at the Goring Hotel in London He related to me that at a meeting at FennoScandia's offices earlier that day, he was shown by Moreton Adamson, who I know, and Mr. Moreton Hall (whom I have heard of but do not recall ever meeting), a letter confirming that FennoScandia loan to Alexandra Mining was not being renewed, Peter was aware of the implications of this and surprise that he had been told so openly.

\Arthur\
\28/10/94\

STATEMENT OF

I, WILLIAM JACKSON CUMMER, of 172 Christie Park Manor SW Calgary, Alberta, Canada T3M 2T6, will say as follows:

1. For 40 years up to my retirement in November 1983. I was employed by Westburne International Industries Limited ("Westburne"). Westburne was at that time a Canadian quoted holding Company divided into three divisions:

   (i) a wholesale heating, plumbing and electrical division;

   (ii) an oil and gas production division; and

   (iii) an oil-well drilling contracting division.

   In 1983 Westburne had an annual turnover of Canadian $1,077 million, Amongst other positions I held, I was the treasurer of Westburne up to approximately 1976 and for the five subsequent years was its president. Between 1981 and 1983, I was vice chairman of Westburne.

2. As well as the executive roles referred to above, I held an operational position within the group. I was president of Westburne International Drilling Limited, which was the company responsible for the group's worldwide oil-well drilling contracts operation. Westburne International Drilling Limited had its head office in Bermuda and, from 1976, I was resident there.

3. When I retired from the Westburne Group, I decided to remain in Bermuda and to pursue other business interests. These were primarily in the venture capital sphere and involved both passive investments and investments where I took a more active role in management.

4. In 1987, I met Peter Webster, whom I understand to be a director of Alexandra Mining Company ("AMC"). The introduction came about because Mr. Webster was using the same Bermudan law firm that I instructed to represent my interests. Mr. Webster was looking for investors in AMC and our mutual lawyers suggested that I might be a possible candidate.

5. Mr Webster told me that he was the manager of AMC resident in Bermuda. He generally told me about that company's aims and aspirations and, in particular, its investment in McFinley Red Lake Mines ("McKinley"), a Canadian Mining operation. Mr. Webster supplied me with further information and documentation concerning AMC's interests and its financial position. He also explained to me that the company was under the effective stewardship of Robert Clarke, who was also a major shareholder, I had not heard of Mr Clarke previously, but his credentials appeared to be sound. I thought that the investment in McFinley had good long-term potential. As a result of what I had been told about AMC, I decided to invest in the company. I believe that my investment, was just under US$20,000 for which I obtained a holding of 3,000 shares.

6. As I have said, Mr Webster was based in Bermuda and, since he was new to the island, I took him under my wing to a certain extent. Over time, we became friends. He kept me generally informed about the progress AMC was making with its making with its investment and, of course, I saw the official material circulated from time to time by the company itself. I was aware that in about January 1988, AMC's shareholders in McKinley was sold to DRX Inc. ("DRX"), in return for which AMC acquired shares in DRX, and that it was intended to develop various mining interests of DRX. In particular, Mr. Clarke planned to amalgamate those interests with others in the Echo Bay Mine in the Randsburg mining district of southern California. I certainly took a long-term view of AMC's potential. I myself at that time was involved in a further investment in a mining venture and I understood that there was an extremely long lead-in time before any projects could come "on-line" and a return could be expected. Nonetheless, all that I heard about AMC sounded as if the company was going in the right direction.

7. At some point in 1980, I met Robert Clarke when he came to Bermuda. Generally, I was impressed by Mr Clarke. Although he did not have any specific experience with Mining operations, his financial acumen and experience was considerable. I remain very happy with my investment in AMC.

8. In late 1988, Peter Webster told me that he had fallen out with Robert Clarke. He did not

explain, and I am still unaware of the reason for the disagreement. Mr. Webster indicated that he had, as a result of those matters, left the employment of AMC. He said that he would be staying, however, in Bermuda and was hoping to get other business interests off the ground.

9. In May, 1989, Mr. Webster returned to Bermuda following a visit to London. He had previously promised that, during the course of that visit, he would try to attract funding for one my own mining ventures. As a result, on Mr Webster's return, he telephoned me and we arranged to meet so that we could discuss this aspect. We met for lunch at the Hamilton Amateur Dinghy Club. In the course of that lunch, Peter Webster told me that he felt that he should inform me that my investment in AMC was at risk. He said that during his visit to London he had met with AMC's London bank, FennoScandia, and had found out that FennoScandia intended not to renew AMC's loan when this fell due. Mr. Webster also referred to AMC's shares in DRX Inc. which were charged to the bank as security for the loan. He inferred that the bank would ultimately foreclose an those shares.

10. Although clearly I was not very pleased to hear that my investment in AMC might be adversely affected by the company's financial plight, my investment was sufficiently small for me to decide to adopt a "wait and see" policy rather than acting on what Mr. Webster had told me. I did not give the matter much further thought at the time although, in retrospect, I considered it very odd that, notwithstanding the fact that Peter

Webster had left AMC in late 1988, he had apparently been given access to information concerning the company's finances by its bank. Later, as a shareholder, I of course received the statements issued respectively by Robert Clarke and by the rest of the AMC board as to their differing views of these matters. It was clear that Mr. Clarke considered that Peter Webster had colluded with FennoScandia Bank in an effort to harm his interests and those of AMC.

11. Following the bank's subsequent foreclosure on the DRX shares, the value of my (and other Shareholders') holdings in AMC depreciated dramatically. Currently, my shareholding has no value although if Mr. Clarke succeeds in obtaining compensation for AMC from FennoScandia Bank, this position may of course change,

I confirm that the contents of this statement are true to the best of my knowledge and belief.

\William Jackson Cummer\
WILLIAM JACKSON CUMMER
\27th\ October 1994